

## **TRANSCRIPT OF RECORD**

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### **Supreme Court of the United States**

**OCTOBER TERM, 1939**

**No. 34**

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**ESTATE OF CHARLES HENRY SANFORD, DE-  
CEASED, JENNIE R. BAIRD, SUBSTITUTIONARY  
ADMINISTRATRIX, C. T. A., PETITIONER,**

*vs.*

**COMMISSIONER OF INTERNAL REVENUE**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT**

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**PETITION FOR CERTIORARI FILED APRIL 17, 1939.**

**CERTIORARI GRANTED MAY 15, 1939.**





# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 34

ESTATE OF CHARLES HENRY SANFORD, DE-  
CEASED, JENNIE R. BAIRD, SUBSTITUTIONARY  
ADMINISTRATRIX, C. T. A., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1]

# **BEFORE UNITED STATES BOARD OF TAX APPEALS**

Docket No. 91847

**JOSEPH McDERMOTT**, Administrator C. T. A. of the Estate  
of Charles Henry Sanford (Deceased)

Amended Title: Estate of Charles Henry Sanford, Deceased; **JOSEPH McDERMOTT**, Administrator, C. T. A. (See Order 1/27/38), Petitioner,

v.

**COMMISSIONER OF INTERNAL REVENUE**, Respondent

## **Appearances:**

For Taxpayer: Montgomery B. Angell, William A. Carr,  
Otis T. Bradley.

For Commissioner: L. S. Pendleton, Esq.

## **DOCKET ENTRIES**

Jan. 7, 1938. Petition received and filed. Taxpayer notified. (Fee paid.)

Jan. 7, 1938. Copy of petition served on General Counsel.

Jan. 26, 1938. Motion to correct the caption to read "Estate of Charles Henry Sanford, deceased, Joseph McDermott, Administrator, c. t. a." filed by taxpayer.

[fol. 2] Jan. 27, 1938. Order that the caption be changed to read "Estate of Charles Henry Sanford, deceased, Joseph McDermott, Administrator, C. T. A.," entered.

Feb. 3, 1938. Answer filed by General Counsel.

Feb. 4, 1938. Hearing set Feb. 15, 1938. Answer served.

Feb. 15, 1938. Hearing had before Mr. Murdock on merits. Submitted. (Argument by Mr. Angell and Mr. Pendleton. (Appearance of Messrs. Angell, Bradley and Carr, Esquires, filed. Stipulation and supplemental stipulations Nos. 1 and 2 filed. Petitioner's brief due 3/4/38. Respondent's brief due 3/15/38.

Feb. 26, 1938. Transcript of hearing 2/15/38 filed.

Mar. 4, 1938. Brief filed by taxpayer. 3/4/38 copy served on General Counsel.

Mar. 12, 1938. Brief filed by General Counsel.

### Docket Entries—Continued

Mar. 25, 1938. Supplemental Brief filed by taxpayer. 3/25/38 copy served on General Counsel.

Apr. 4, 1938. Supplemental reply brief filed by General Counsel.

Apr. 13, 1938. Memorandum Opinion rendered, John E. Murdock, Div. 3. Decision will be entered for the respondent.

Apr. 14, 1938. Decision entered, J. E. Murdock, Div. 3.

[fol. 3] Apr. 28, 1938. Petition for review by United States Circuit Court of Appeals, Third Circuit, with assignments of error filed by taxpayer.

Apr. 28, 1938. Proof of service filed by taxpayer.

Apr. 28, 1938. Agreed statement of evidence approved and ordered filed.

Apr. 28, 1938. Proof of service of praecipe filed.

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[fol. 4] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed January 7, 1938

The above-named petitioner, by his undersigned attorneys, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT-ET-GT-25-24-1st New Jersey) dated October 16, 1937, and as a basis of his proceedings alleges as follows:

1. The petitioner is a citizen of New Jersey, and resides at Freehold, New Jersey. He is the duly qualified and acting administrator c. t. a. of the estate of Charles Henry Sanford, deceased, who died a resident of Monmouth County, New Jersey, on December 22, 1928.

2. Upon information and belief, the notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on or about October 16, 1937.

3. The taxes in controversy are Federal gift taxes, and the amount in controversy is \$1,000,745.

4. The determination of the gift taxes set forth in the said notice of deficiency is based upon the following errors:

[fol. 5] (a) The Commissioner erred in determining that Charles Henry Sanford, now deceased, by virtue of a certain supplemental trust indenture made on August 21, 1924, wherein the deceased amended the trust indenture dated December 24, 1913, and renounced all rights to further modify the terms of the trust indenture of December 24, 1913, made a gift of certain property in 1924 taxable under the provisions of the Gift Tax Law of 1924.

(b) The Commissioner erred in failing to determine that Charles Henry Sanford in 1919 made a completed gift of and put beyond recall the property held in the trusts when on November 26, 1919, he modified the original trust indenture of December 24, 1913, and indentures supplemental thereto, renouncing all right to revest in himself either the principal or income of the trusts, and reserving only the right to modify such trusts, and consequently the deceased made no taxable transfer on August 21, 1924, when he surrendered his right to modify the trusts.

(c) The Commissioner erred in holding that the surrender in 1924 by the settlor of the right to modify the terms of the trusts constituted a taxable gift in 1924, when in 1919 the settlor had by appropriate instrument surrendered any and all rights to revest in himself either the corpus or income of the trust funds.

(d) The Commissioner erred in determining that where the settlor of certain trusts surrendered all power of revocation many years prior to the enactment of any Federal Gift Tax Act, reserving only the right to modify as distinguished from the right to revest in himself any income or principal, the relinquishment of this right to modify in a subsequent year when the Federal Gift Tax Act was in effect subjected the settlor of the trusts and his estate to a gift tax [fol. 6] measured by the value of the trust property at the time the right of modification was surrendered.

(e) The Commissioner erred in determining that there is any deficiency in Federal gift taxes for which the petitioner is liable, either in the amount of \$1,000,745 or in any amount whatever.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On December 24, 1913, Charles Henry Sanford, the deceased, created four certain trusts, of which in each in-



stance the Guaranty Trust Company of New York was trustee. On December 24, 1913, and at various times thereafter, the deceased transferred certain property to the Guaranty Trust Company of New York as trustee under such trusts. These four trusts were created under one trust indenture dated December 24, 1913, and are known, respectively, as the "Sarita E. Barclay Trust," the "Frances G. Phipps Trust," the "Herbert S. Ward Trust" and the "Colville H. S. Barclay Trust."

(b) Under the original trust indenture, the deceased reserved the power of revocation and of modification. From time to time the deceased made certain modifications in these trusts not material to the issues raised herein. On November 26, 1919, the deceased entered into a supplemental trust indenture which after reciting the provisions of the instrument dated December 24, 1913, reserving to the deceased the right of revocation and of modification, stated that such provisions were modified so as to read as follows:

"The party of the first part, however, reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required [fol. 7] to be acknowledged under the laws of the State of New York, and filed with the party of the second part; but this right of modification, however, shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument."

(c) The deceased's rights in respect of the trusts lay in this condition until August 21, 1924. On that date, the deceased executed a supplemental trust indenture, which, after reciting certain paragraphs in the indenture then in effect, including the paragraph quoted above covering the power of modification, provided that such provisions—

"are hereby revoked and in their place and stead the following terms shall apply and govern as to each and every trust created hereunder, to wit:

. . . . .

(7) The party of the first part hereby renounces all rights to further modify the terms of the said trusts or any of

them and does hereby surrender all such rights reserved to him by the indenture of December 24, 1913, and by the various indentures supplemental thereto."

(d) Aside from Charles Henry Sanford's reserved power to retake the principal and income of the trusts, which he irrevocably surrendered on November 26, 1919; by supplemental trust indenture, Charles Henry Sanford did not at any time have any beneficial interest in the trusts.

(e) No gift tax return was filed by Charles Henry Sanford for 1924. In the summer or early fall of 1934, a representative of the Bureau of Internal Revenue, during an interview with the petitioner, raised the question as to whether the settlor's surrender of the right to modify the terms of the trust on August 21, 1924, imposed a gift tax [fol. 8] in respect of the properties transferred in trust. Thereupon, the petitioner prepared and on or about October 16, 1934, filed a gift tax return with the Collector of Internal Revenue for the District of New Jersey in Newark listing the property held by the trustee in these trusts on August 21, 1924, but disclaiming any liability for a gift tax. A case was made upon such return and a hearing was had in Washington before the representatives of the Miscellaneous Tax Division, at which the issue raised was fully presented orally and a comprehensive memorandum of law was filed.

(f) Early in 1935, the petitioner was advised that the matter had been referred to the General Counsel of the Bureau of Internal Revenue for further consideration, and on or about March 27, 1935, an extended hearing was had, at which the Acting General Counsel and various other representatives of the Bureau of Internal Revenue were present. Again the question was fully and completely presented, with repeated references to the written memorandum of law filed the preceding October.

(g) Following this hearing, under date of April 19, 1935, D. S. Bliss, Deputy Commissioner of Internal Revenue, addressed a letter to the petitioner at Freehold, New Jersey, a copy of which is attached hereto marked Exhibit B. Upon information and belief, before the aforesaid letter of April 19, 1935, was dispatched, the proposed action of the Commissioner of Internal Revenue was submitted to

the Secretary of the Treasury or the Under-Secretary of the Treasury, and was approved by him.

(h) For the purposes of this proceeding, the aggregate value of all of the property held in the trusts as of August 21, 1924, was \$6,846,225.06.

[fol. 9] Wherefore, the petitioner prays that this Board hear these proceedings and determine that the deficiency determined by the respondent in his notice of deficiency amounting to \$1,000,745 is erroneous; that there is no deficiency in respect of petitioner's gift taxes for the year 1924, or for any other year; and that the Board grant such other and further relief as it may deem proper.

(Sgd.) Montgomery B. Angell, William A. Carr, Attorneys for the Petitioner.

*Duly sworn to by Joseph McDermott. Jurat omitted in printing.*

[fol. 10] EXHIBIT "A" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to MT-ET-GT-25-24-1st New Jersey.

Donor—Charles Henry Sanford (Deceased).

Oct. 16, 1937.

Joseph McDermott, Administrator, c. t. a., Freehold, New Jersey.

Sir:

A deficiency of \$1,000,745.00 in the Federal gift tax liability of the above-named deceased donor for the calendar year 1924, has been determined after an examination of the return, Form 706A, and other data on file. The determination of the deficiency and the action of this office is fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of section 318 (a) of the Revenue Act of 1926, and section 308 (a) of the Revenue Act of 1926, as amended by section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within ninety days



(not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and [fol. 11] forward the enclosed Form 890A, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit you by preventing the accumulation of interest charges, as the interest period terminates thirty days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the ninety-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890A, has not been submitted, the deficiency will be thereafter assessed.

Respectfully, Guy T. Helvering, Commissioner,  
(Signed) by: D. S. Bliss, Deputy Commissioner.

Enclosures: Statement. Waiver.

### Statement

By virtue of the supplemental indenture made the 21st day of August, 1924, wherein the deceased donor amended the indenture dated December 24, 1913, and renounced all rights to further modify the terms of the December 24, 1913 trust, the deceased donor made a taxable gift. The [fol. 12] value of such gift is explained in the following computation:

	Returned	Determined
Total gifts, 1924	\$0.00	\$6,846,225.06
Less—specific exemption	0.00	50,000.00
Net gifts, 1924	0.00	6,796,225.06
Tax on net gifts for 1924		\$1,000,745.00
Tax assessed on return		0.00
Deficiency		\$1,000,745.00

The deficiency bears interest at the rate of six per cent per annum from the due date of the tax, March 15, 1925, to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The deficiency results from the following adjustments:

Schedule A

Total value of "Sarita E. Barclay Trust" as of August 21, 1924	\$0.00	\$2,209,225.77
Total value of "Frances G. Phipps Trust" as of August 21, 1924	0.00	2,209,285.88
Total value of "Herbert S. Ward Trust" as of August 21, 1924	0.00	2,210,387.56
Total value of "Colville H. S. Barclay Trust" as of August 21, 1924	0.00	217,325.85

[fol. 13]

EXHIBIT "B" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to MT-ET-GT-CI-25-1st New Jersey.

Donor—Charles Henry Sanford.

Apr. 19, 1935.

Joseph McDermott, Administrator, Freehold, New Jersey.

Sir:

The gift tax return filed on Form 706-A for the calendar year 1924 in behalf of Charles Henry Sanford, deceased December 22, 1928, has been examined in connection with the information of record.

The examination discloses no gift tax liability. Accordingly, the case has been marked closed in so far as the Federal gift tax is concerned.

Respectfully, D. S. Bliss, Deputy Commissioner.

## [fol. 14] BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER—Filed February 3, 1938

The Commissioner of Internal Revenue, the respondent herein, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs Nos. 1, 2 and 3 of the petition.

4. (a), (b), (c), (d), (e). Denies that the determination of the deficiency is based upon errors as alleged in paragraphs No. 4 (a), (b), (c), (d) and (e) of the petition.

5. (a). Denies the matter set forth in paragraph No. 5 (a) of the petition, except it is admitted that on December 24, 1913 Charles H. Sanford created certain trusts of which the Guaranty Trust Company of New York as trustee; that on December 24, 1915 and at various times thereafter the deceased transferred certain property to the Guaranty Trust Company of New York as trustee, under such trusts, and that the trusts were created under one trust indenture dated December 24, 1913.

(b), (c). Denies the matters set forth in paragraph No. 5 (b) and (c) of the petition, except it is admitted that on November 26, 1919, and August 21, 1924, the decedent entered into and executed supplemental trust indentures.

(d). Denies the allegations contained in paragraph No. 5 (d) of the petition.

(e). Denies the matter set forth in paragraph No. 5 (e) of the petition, except it is admitted that no gift tax return [fol. 15] was filed by Charles Henry Sanford for 1924 and that the petitioner filed a gift tax return with the Collector of Internal Revenue for the district of New Jersey, at Newark, listing the property held by the trustee in these trusts on August 21, 1924, but disclaiming any liability for a gift tax.

(f), (g). Denies the allegations contained in paragraph No. 5 (f) and (g) of the petition.

(h). Admits the allegations contained in paragraph No. 5 (h) of the petition.

Denies generally and specifically each and every allegation contained in the petition, not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved.

(Sgd.) J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: Frank T. Horner, Lewis S. Pendleton, Special Attorneys, Bureau of Internal Revenue.

LSP/bj 1/21/38.

[fol. 16] BEFORE UNITED STATES BOARD OF TAX APPEALS

ORDER TO AMEND CAPTION—Filed January 27, 1938

On motion of counsel for the petitioner, it is

Ordered that the caption of the proceeding at the above docket number be and the same is hereby amended to read Estate of Charles Henry Sanford, deceased, Joseph McDermott, Administrator, c. t. a., Petitioner, v. Commissioner of Internal Revenue, Respondent, instead of Joseph McDermott, Administrator c. t. a. of the Estate of Charles Henry Sanford, deceased, Petitioner, v. Commissioner of Internal Revenue, Respondent.

(Sgd.) C. R. Arundell, Member.

Dated Washington, D. C., January 27, 1938.

cgh.

[fol. 17] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Filed February 15, 1938

It is hereby stipulated and agreed by and between the parties to the above-entitled appeal, by their respective attorneys, that the following facts may be taken as true, subject, however, to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated.

(1) Joseph McDermott, the petitioner, is a citizen of the State of New Jersey, and resides at Freehold, New Jersey.

He is the duly qualified and acting administrator cum testamento annexo of the Estate of Charles Henry Sanford, deceased, who died a resident of Monmouth County, New Jersey, on December 22, 1928.

(2) The notice of deficiency (a true copy of which is attached to the petition herein, marked Exhibit A) was mailed to the petitioner on October 16, 1937.

(3) The taxes in controversy are Federal gift taxes for the calendar year 1924, and the amount in controversy is \$1,000,745.00.

[fol. 18] (4) On December 24, 1913 Charles Henry Sanford, the deceased, created certain trusts, of which the Guaranty Trust Company of New York was trustee. On December 24, 1913, and at various times thereafter, the deceased transferred certain property to the Guaranty Trust Company of New York as trustee under such trusts. The trusts were created under one trust indenture dated December 24, 1913. In this trust indenture and all supplemental trust indentures, Charles Henry Sanford was designated as the party of the first part and the Guaranty Trust Company of New York as party of the second part.

(5) On November 26, 1919 and August 21, 1924 the deceased, Charles Henry Sanford, executed supplemental trust indentures.

(6) There is attached hereto [at end of record] as Annex A a copy of the aforesaid trust indenture of December 24, 1913, and copies of all supplemental trust indentures.

(7) No gift tax return was filed by Charles Henry Sanford for 1924, but on October 22, 1934, the petitioner filed with the Collector of Internal Revenue for the district of New Jersey, in Newark, New Jersey, a gift tax return in behalf of the Estate of Charles Henry Sanford for the year 1924, listing the property held by the trustee in these trusts on August 21, 1924, but disclaiming any liability for a gift tax.

(8) For the purposes of this proceeding the aggregate value of all of the property held in the trusts as of August 21, 1924, was \$6,846,225.06.

Montgomery B. Angell, Attorney for Petitioner. - J.  
P. Wenchel, Chief Counsel, Bureau of Internal Revenue.



## [fol. 19] BEFORE UNITED STATES BOARD OF TAX APPEALS

## SUPPLEMENTAL STIPULATION No. 1—Filed February 15, 1938

It is hereby stipulated and agreed, by and between the parties to the above entitled appeal, by their respective attorneys, that the following facts may be taken as true, subject, however, to the right of either party to introduce other and further evidence and to object to the relevancy or materiality of any of the facts herein stipulated.

1. For the purposes of this proceeding only, the recitals of the trust indentures of December 24, 1913, and of the supplemental trust indentures (Modifications Nos. 1 to 11, inclusive, as more particularly described on the cover page of Annex A to the original stipulation herein) may be taken as true; and that Sarita E. Barclay, Frances G. Phipps, Herbert S. Ward and Colville H. S. Barclay were alive and in being on August 21, 1924.

2. In the early fall of 1934, a revenue agent, in an interview with the petitioner, raised the question as to whether the surrender on August 21, 1924, by Charles Henry Sanford of the right to modify the terms of the trust imposed a gift tax in respect to the property constituting the corpus of the trusts. Following this interview petitioner filed a gift tax return as set forth in the main stipulation herein, Par. (7).

3. Following the filing of this return a hearing on the question of the taxability of the transfer in 1924 was held on October 18, 1934, in Washington before representatives of the Miscellaneous Tax Unit, charged with the administration of the Gift Tax Act, at which counsel for the petitioner appeared. At this hearing a memorandum of law [fol. 20] was filed on behalf of the petitioner and the question was fully argued and considered.

4. Subsequently the question was referred to the Assistant General Counsel for the Bureau of Internal Revenue and on March 27, 1935, a hearing was had before the Acting Assistant General Counsel for the Bureau of Internal Revenue at which counsel for the petitioner again appeared and some ten or twelve representatives of the Assistant General Counsel's office and the Bureau of Internal Revenue were present. The question was again fully argued and considered. Following the hearing, a memorandum (unpub-

lished) known as G. C. M. 14774 was prepared in the office of the Assistant General Counsel for the Bureau of Internal Revenue and delivered to the Deputy Commissioner in Charge of the Miscellaneous Tax Unit, which ruling was signed in the name of the Assistant General Counsel for the Bureau of Internal Revenue. A copy of this ruling is attached hereto as Exhibit "B".

5. Prior to the ruling known as G. C. M. 14774, attached hereto as Exhibit "B," and before the hearing had before the Assistant General Counsel for the Bureau of Internal Revenue on March 27, 1935, the Assistant General Counsel addressed a memorandum (unpublished) to the Under Secretary of the Treasury dated February 21, 1935, known as G. C. M. 14497, a copy of which is attached hereto as Exhibit "C".

6. Under date of April 8, 1935, Mr. Arthur H. Kent, Acting Assistant General Counsel for the Bureau of Internal Revenue, addressed a memorandum to Herman Oliphant, the General Counsel for the Treasury Department, a copy of which is attached hereto marked Exhibit "D."

7. On or about April 19, 1935, Deputy Commissioner Bliss signed and mailed a letter to the petitioner ruling that an [fol. 21] examination of the gift tax return filed by the petitioner for 1924 disclosed no gift tax liability. A copy of this letter dated April 19, 1935, is attached hereto as Exhibit "E".

8. Prior to the mailing of Deputy Commissioner Bliss' letter of April 19, 1935, the ruling incorporated in such letter was approved by the Assistant General Counsel for the Bureau of Internal Revenue as evidenced by the memorandum known as G. C. M. 14774 attached hereto as Exhibit "B".

9. In his administration of the Gift Tax Act of 1924 and the Gift Tax Act of 1932, and prior to the promulgation of the decision in the case of *Hesslein v. Hoey*, 91 Fed. (2) 954, decided July 26, 1937, it has been the uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved to treat the taxable transfer subject to the gift tax as occurring when the transferor relinquished all power to revest in himself title to the property constituting the subject of the transfer. It is esti-

mated that approximately 300 cases of such character have been closed or were adjusted in accordance with the above practice.

10. Under date of October 14, 1937, the Chief Counsel for the Bureau of Internal Revenue addressed a memorandum known as G. C. M. 19260 to the Deputy Commissioner in Charge of the Miscellaneous Tax Unit, a copy of which is attached hereto as Exhibit "F."

William A. Carr, Montgomery B. Angell, Attorneys for Petitioner. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[fol. 22] EXHIBIT "B" TO SUPPLEMENTAL STIPULATION  
(No. 1)

GC: I: MAW.  
A-282188.

Apr. 8, 1935.

In re Charles Henry Sanford Estate, Freehold, New Jersey  
G. C. M. 14774.

Deputy Commissioner Bliss:

Reference is made to your memorandum of February 6, 1935, in which you request to be advised whether the transfer by gift of property belonging to the above named decedent is subject to the gift tax imposed by section 319 of the Revenue Act of 1924.

The said law imposed a tax—

"... upon the transfer by . . . gift . . . of any property . . . , whether made directly or indirectly, . . ."

On December 24, 1913, the said Charles Henry Sanford created certain trusts, reserving to himself the right to terminate or modify any or all of them. On November 26, 1919, he relinquished the right to terminate said trusts but reserved to himself the right to modify them, specifying, however, that such right of modification should not be so construed as to include any right or privilege to withdraw



either principal or interest from any trust. On August 21, 1924, the said Sanford renounced all right to modify the said trusts. He died December 22, 1928.

Inasmuch as the trusts were created and the right to terminate them was relinquished before the law imposing the gift tax became effective the sole question to be considered is whether the renouncement of the right of Sanford to modify the trust, a transaction which occurred on August 21, 1924, after the gift tax became effective, operated as a transfer of property by gift and was subject to tax.

[fol. 23] It is well settled that the mere creation of a revocable trust does not operate as a transfer of property. The settlor of such a trust retains complete control over the property; the income from the property is taxable to him (*Corliss v. Bowers*, 281 U. S. 376) and on the settlor's death the property is taxable as a part of his estate (*Reinecke v. Northern Trust Co.*, 278 U. S. 339).

In the leading case of *Burnet v. Guggenheim* (288 U. S. 280), the Supreme Court considered the question whether deeds of trust made in 1917, with a reservation to the grantor of a power of revocation, became taxable as gifts under the Revenue Act of 1924 when in 1925 there was a change in the deeds by the cancellation of the power to revoke. In its opinion the court used the following language, viz:

“ \* \* \* Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice, between the one date and the other.  
 \* \* \* The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall.

“ \* \* \* The tax upon gifts is closely related both in structure and in purpose to the tax upon those transfers

[fol. 24] that take effect at death. What is paid upon the one is in certain circumstances a credit to be applied in reduction of what will be due upon the other, 43 Stat. 315, section 322, 26 U. S. C. section 1134 (26 U. S. C. A. section 1134 and note). The gift tax is part 2 of title 3 of the Revenue Act of 1924, (see 26 U. S. C. A. section 1131 note et seq.); the estate tax is part 1 of the same title (see 26 U. S. C. A. section 1091 et seq.). The two statutes are plainly in *pari materia*. There has been a steady widening of the concept of a transfer for the purpose of taxation under the provisions of part 1. *Tyler v. United States*, *supra*; *Chase National Bank v. United States*, *supra*; *Saltonstall v. Saltonstall*, *supra*; cf. *Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830. There is little likelihood that the lawmakers meant to narrow the concept, and to revert to a construction that would exalt the form above the substance, in fixing the scope of a transfer for the purposes of part 2. We do not ignore differences in precision of definition between the one part and the other. They cannot obscure identities more fundamental and important. The tax upon estates, as it stood in 1924, was the outcome of a long process of evolution; it had been refined and perfected by decisions and amendments almost without number. The tax on gifts was something new. Even so, the concept of a transfer, so painfully developed in respect of taxes on estates, was not flung aside and scouted in laying this new burden upon transfers during life. Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title. The word had gained a new color, the result, no doubt in part, of repeated [fol. 25] changes of the statutes, but a new color none the less. . . .

"The respondent finds comfort in the provisions of section 320 (d) of the Revenue Act of 1924 (26 U. S. C. A. section 1094 note), governing taxes on estates. He asks why such a provision should have been placed in part 1 and nothing equivalent inserted in part 2, if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. Section 302 (d) of the act of 1924 is in part a re-enactment of a section of the Revenue Acts of 1918 and 1921, though it has been changed in particulars. 40 Stat. 1097, c. 18, section 402 (c); 42 Stat. 227, c. 136, section 402 (c). Cf. *Reinecke v. Northern*

Trust Co., 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397. It is an outcome of that process of development which has given us a rule for almost every imaginable contingency in the assessment of a tax under the provisions of part 1. No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of part 2. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer. Here as so often there is a choice between uncertainties. We must be content to choose the lesser. To lay the tax at once, while the deed is subject to the power, is to lay it on a gift that may never become consummate in any real or beneficial sense. To lay it later on is to unite benefit with burden. We think the voice of Congress has ordained that this be done."

The conclusion reached in this case that deeds of trust reserving a power of revocation effected a taxable transfer by gift when the settlor cancelled such power would undoubtedly be controlling in the instant case if it were not for the fact that on November 26, 1919, when Sanford relinquished his right to terminate the trusts previously created by him he had not, in the same instrument, reserved to himself the right to modify said trusts.

Certain language used by the Supreme Court in the case of the Chase National Bank v. United States (278 U. S. 327), which dealt with the constitutionality of the estate tax provisions of the Revenue Act of 1921, is deemed to be pertinent to the question here in issue. In that case the court said:

"But we think that the rule applied in *Saltonstall v. Saltonstall* to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which *makes it incomplete as to the donor as well as to the donee*, and we think that the termination of such power at death may also be the appropriate subject of a tax upon transfers." (Italics added.)

The case of *Porter v. Commissioner* also has some features in common with those in the instant case. In that

case one Porter created a trust fund, consisting of bonds, for the benefit of certain persons and divested himself of all interest in the bonds but reserved to himself the power at any time to alter or modify any or all of the trusts in any manner, expressly excepting, however, any change in favor of himself or his estate. The question in issue was whether the bonds in the said trust formed a portion of his net estate at the time of his death. The Circuit Court of Appeals for the Second Circuit held that the bonds were [fol. 27] subject to the estate tax (60 Fed. (2d) 673) and in the course of its opinion laid down the following rule, viz.

“A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends.”

The case was taken to the Supreme Court, which affirmed the judgment of the lower court, and in the course of its decision used the following language (288 U. S. 436), viz:

“The net estate upon the transfer of which the tax is imposed is not limited to property that passes from decedent at death. Subdivision (d) requires to be included in the calculation all property previously transferred by decedent, the enjoyment of which remains at the time of his death subject to any change by the exertion of a power by himself alone or in conjunction with another. Petitioner argues that, as decedent was without power to revoke the transfers or to alter or modify the trusts in favor of himself or his estate, the property is not covered by subdivision (d). . . . We need not consider whether every change, however slight or trivial, would be within the meaning of the clause. Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. The transfers under consideration are undoubtedly covered by subdivision (d).”



Later in the decision, the court, in referring to contentions made in behalf of the estate, said:

[fol. 28] "They treat as without significance the power the donor reserved unto himself alone and ground all their arguments upon the fact that deceased, prior to such enactment, completely divested himself of title without power of revocation. It is true that the power reserved was not absolute as in the transfer considered in *Burnet v. Guggenheim*, supra, in which this court, in the absence of any provision corresponding to subdivision (d), held that the donor's termination of the power amounted to a transfer by gift within the meaning of section 319 of the Revenue Act of 1924, 43 Stat. 313 (26 U. S. C. A. section 1131 note). But the reservation here may not be ignored for while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. \* \* \*

Representatives of the Sanford Estate contend that the decision in the *Guggenheim* case is controlling in the instant case and that as Sanford on November 26, 1919, relinquished his right to terminate the trusts, thereby parting with his beneficial interest in the property, and that as such action was taken before the Revenue Act of 1924 became effective, no gift tax may properly be collected in the instant case. They endeavor to distinguish the *Porter* decision by the contention that section 302 (d) of that act, forming the basis of the court's conclusion, relates to the estate tax alone and that, therefore, the reasoning used in that case may not properly be applied to the instant case in which liability for the gift tax is in question.

From a consideration of those authorities, it might well be argued, on the one hand, that even though the decedent did on November 26, 1919, relinquish his right to terminate the trusts the fact that he still reserved the right to modify [fol. 29] them left the gifts conditional and inchoate. He still had the right to make a complete revision of all he had done in respect of the creation of the trusts. Having this power and applying the principle enunciated by the courts in passing upon the cases cited that a gift is incom-

plete so long as the donees remain indeterminate, it does not seem difficult to conclude that the transfers in question did not become effective until August 21, 1924, when, for the first time, the said Sanford finally relinquished his right to modify the trusts.

On the other hand, in the Guggenheim case, *supra*, the Supreme Court held, in unqualified terms, that a taxable transfer of property by gift occurs when the settlor of a trust who had reserved a power of revocation cancels such power. This same view is embodied in section 501 (c) of the Revenue Act of 1932, reading as follows:

“ \* \* \* The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.”

In this connection, article 1 of Gift Tax Regulations 67, under the Revenue Act of 1924, provides as follows:

“The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income [fol. 30] of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated.”

This same view is embodied in article 3 of Gift Tax Regulations 79, under the Revenue Act of 1932, reading in part as follows:

“ \* \* \* The relinquishment or termination, without an adequate and full consideration in money or money's worth, of the power to revest in the donor title to property transferred in trust, is a gift of such property at the time of the

relinquishment or termination of the power, except where the power is terminated by the donor's death. \* \* \*

Other arguments, pro and con, have been advanced in respect of the question in issue but upon a careful consideration of all of them this office is convinced that the Department must adhere to the position that in all such cases the relinquishment or cancellation by the settlor of his right to revest title to the trust property in himself constitutes the gift of the property for gift tax purposes. If the consummation of the gift by vesting title to the property in the donee were to be adopted as the criterion of taxability any such rule would not only be in conflict with the court decisions and regulations cited but, it seems certain, would also lead to many difficulties of an administrative character and otherwise. So far as Sanford was concerned the gift was complete on the date when he relinquished the right to terminate the trusts.

For the reasons indicated it is the opinion of this office that the gift in the instant case became effective on November 26, 1919, when the said Sanford relinquished his right to terminate the trusts in question and that as this transfer [fol. 31] action occurred before the gift tax law became effective it is not subject to said tax.

A conference in the case was held in this office on March 27, 1935.

The file of papers belonging to your Unit is herewith returned.

R. H. J., A. H. K. (Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

Enclosure: Papers in Case.

EXHIBIT "C" TO SUPPLEMENTAL STIPULATION (No. 1)

GC:I:MAW.

A-282188.

Feb. 21, 1935.

In re Charles Henry Sanford Estate, Freehold, N. J. G. C. M.  
14497

Memorandum for Under Secretary Coolidge

Reference is made to your letter of February 12, 1935, in which you request to be furnished with a memorandum in the matter of a gift tax claimed by the Treasury against a

certain trust created by Mr. Charles H. Sanford, deceased, in which matter the British Embassy is interested.

Section 319 of the Revenue Act of 1924 imposed a tax—

“ . . . upon the transfer by . . . gift . . . of any property . . . , whether made directly or indirectly, . . . ”

On December 24, 1913, Charles Henry Sanford created certain trusts, reserving to himself the right to terminate or [fol. 32] modify any or all of said trusts. On November 26, 1919, he relinquished the right to terminate said trusts but reserved to himself the right to modify them, specifying, however, that such right of modification should not be so construed as to include any right or privilege to withdraw principal or interest from any trust. On August 21, 1924, the said Sanford renounced all right to modify the said trusts.

The question to be decided is whether, under those conditions, there was a taxable transfer of property by gift, either directly or indirectly, and, if so, when that transfer was made.

No law imposing a gift tax was in force on December 24, 1913, when the trusts were created, nor on November 26, 1919, when the said Sanford relinquished his right to terminate the said trusts. The Revenue Act of 1924 imposing the gift tax was in force on August 21, 1924, when Sanford renounced all rights to modify the said trusts. Consequently, the only question to be decided is whether the act taken by him on August 21, 1924, operated as a transfer of property by gift.

It is well settled that the mere creation of a revocable trust does not operate as a transfer of property. The settlor of such a trust retains complete control over the property; the income from the property is taxable to him (*Corliss v. Bowers*, 281 U. S. 376) and on the settlor's death the property is taxable as a part of his estate (*Reinecke v. Northern Trust Co.*, 278 U. S. 339).

In the leading case of *Burnet v. Guggenheim* (288 U. S. 280), the Supreme Court considered the question whether deeds of trust made in 1917, with a reservation to the grantor of a power of revocation, became taxable as gifts under the Revenue Act of 1924 when in 1925 there was a change in the



[fol. 33] deeds by the cancellation of the power to revoke. In its opinion the court used the following language, viz:

“ \* \* \* Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice, between the one date and the other. \* \* \*

The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall.

“ \* \* \* The tax upon gifts is closely related both in structure and in purpose to the tax upon those transfers that take effect at death. What is paid upon the one is in certain circumstances a credit to be applied in reduction of what will be due upon the other, 43 Stat. 315, section 322, 26 U. S. C. section 1134 (26 U. S. C. A. section 1134 and note). The gift tax is part 2 of title 3 of the Revenue Act of 1924 (see 26 U. S. C. A. section 1131 note et seq.); the estate tax is part 1 of the same title (see 26 U. S. C. A. section 1091 et seq.) The two statutes are plainly in pari materia. There has been a steady widening of the concept of a transfer for the purpose of taxation under the provisions of part 1. *Tyler v. United States*, supra; *Chase National Bank v. United States*, supra; *Saltonstall v. Saltonstall*, supra; cf. *Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830. There is little likelihood that the lawmakers meant to narrow the concept, and to revert to a construction that would exalt the form above the substance, in fixing the scope of a transfer for the purposes of part 2. We do not ignore differences in [fol. 34] precision, of definition between the one part and the other. They cannot obscure identities more fundamental and important. The tax upon estates, as it stood in 1924, was the outcome of a long process of evolution; it had been refined and perfected by decisions and amendments almost without number. The tax on gifts was something new. Even so, the concept of a transfer, so painfully developed in re-

spect of taxes on estates, was not flung aside and scouted in laying this new burden upon transfers during life. Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title. The word had gained a new color, the result, no doubt in part, of repeated changes of the statutes, but a new color none the less. . . .

"The respondent finds comfort in the provisions of section 302 (d) of the Revenue Act of 1924 (26 U. S. C. A. section 1094 note), governing taxes on estates. He asks why such a provision should have been placed in part 1 and nothing equivalent inserted in part 2, if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. Section 302 (d) of the act of 1924 is in part a re-enactment of a section of the Revenue Acts of 1918 and 1921, though it has been changed in particulars. 40 Stat. 1097, c. 18, section 402 (c); 42 Stat. 227, c. 136, section 402 (c). Cf. *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397. It is an outcome of that process of development which has given us a rule for almost every imaginable contingency in the assessment of a tax under the provisions of part 1. No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of part 2. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer. Here as so often there is a choice between uncertainties. We must be content to choose the lesser. To lay the tax at once, while [fol. 35] the deed is subject to the power, is to lay it on a gift that may never become consummate in any real or beneficial sense. To lay it later on is to unite benefit with burden. We think the voice of Congress has ordained that this be done."

The conclusion reached in that case that deeds of trust reserving a power of revocation effected a taxable transfer by gift when the settlor cancelled such power would undoubtedly be controlling in the instant case if it were not for the fact that on November 26, 1919, when Sanford relinquished his right to terminate the trusts previously created by him he had not, in the same instrument, reserved to himself the right to modify said trusts.

Certain language used by the Supreme Court in the case of the Chase National Bank v. United States (278 U. S. 327),

which dealt with the constitutionality of the estate tax provisions of the Revenue Act of 1921, is deemed to be pertinent to the question here in issue. In that case the court said:

"But we think that the rule applied in *Saltonstall v. Saltonstall* to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made in a limitation on the gift which *makes it incomplete as to the donor as well as to the donee*, and we think that the termination of such power at death may also be the appropriate subject of a tax upon transfers." (Italics added.)

The case of *Porter v. Commissioner* also has some features in common with those in the instant case. In that case one Porter created a trust fund, consisting of bonds, for the benefit of certain persons and divested himself of all interest in the bonds but reserved to himself the power at any [fol. 36] time to alter or modify any or all of the trusts in any manner, expressly excepting, however, any change in favor of himself or his estate. The question in issue was whether the bonds in the said trust formed a portion of his net estate at the time of his death. The Circuit Court of Appeals for the Second Circuit held that the bonds were subject to the estate tax (60 Fed. (2d) 673) and in the course of its opinion laid down the following rule, viz:

"A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends."

The case was taken to the Supreme Court, which affirmed the judgment of the lower court, and in the course of its decision used the following language, (288 U. S. 436), viz:

"The net estate upon the transfer of which the tax is imposed is not limited to property that passes from decedent at death. Subdivision (d) requires to be included in the calculation all property previously transferred by decedent, the enjoyment of which remains at the time of his death subject to any change by the exertion of a power by himself

alone or in conjunction with another. Petitioner argues that, as decedent was without power to revoke the transfers or to alter or modify the trusts in favor of himself or his estate, the property is not covered by subdivision (d). \* \* \* We need not consider whether every change, however slight or trivial, would be within the meaning of the clause. Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries [fol. 37] named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. The transfers under consideration are undoubtedly covered by subdivision (d)."

Later in the decision, the court, in referring to contentions made in behalf of the estate, said:

"They treat as without significance the power the donor reserved unto himself alone and ground all their arguments upon the fact that deceased, prior to such enactment, completely divested himself of title without power of revocation. It is true that the power reserved was not absolute as in the transfer considered in *Burnet v. Guggenheim*, supra, in which this court, in the absence of any provision corresponding to subdivision (d), held that the donor's termination of the power amounted to a transfer by gift within the meaning of section 319 of the Revenue Act of 1924, 43 Stat. 313 (26 U. C. S. A. Section 1131 note). But the reservation here may not be ignored for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. \* \* \*

Representatives of the Sanford Estate contend that the decision in the Guggenheim case is controlling in the instant case and that as Sanford on November 26, 1919, relinquished his right to terminate the trusts, thereby parting with his beneficial interest in the property, and that as such action

was taken before the Revenue Act of 1924 became effective, no gift tax may properly be collected in the instant case. They endeavor to distinguish the Porter decision by the con-[fol. 38] tention that section 302(d) of that Act, forming the basis of the court's conclusion, relates to the estate tax alone and that, therefore, the reasoning used in that case may not properly be applied to the instant case in which liability for the gift tax is in question.

This office cannot agree in these contentions. Prior to November 26, 1919, the gifts were conditional and inchoate. They were not in complete and final operation. Sanford, at any time prior to that date, could have revested complete title to the property in himself. His relinquishment of that power on November 26, 1919, divested him of that right but he still had the broad power to modify the trusts. Under this power there is no doubt whatever that he could have changed the beneficiaries, alter the sums they were to receive, and, in short, he could undo all he had done when he created the trusts, save alone, the revesting of property in himself. The difference in the wording of the estate tax and gift tax provisions of the law has no effect whatever upon this obvious rule. Having this power to modify, the rights of the beneficiaries were not vested and certain, but were subject to change. The gifts of the property were still held in abeyance. There was still uncertainty as to who were to be the final donees of the property. As was said by the Supreme Court in the Corliss case, supra—

“ . . . taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed.”

Sanford certainly had command over the final disposition of the property in the trusts until August 21, 1924. No final gifts of the property had been made prior to that date. On that date, when, for the first time, he completely renounced all right to modify the trusts, did the donees have full title and interest in the gifts. Before that date the gifts were [fol. 39] qualified and uncertain. Not until that date did they have unqualified and vested ownership in the property. The gifts were not fully consummated until then.

For the reasons stated, it is the opinion of this office that the gifts of the property in question were not effective and absolute until August 21, 1924, and that, therefore, those



gifts were subject to the gift tax imposed by section 319 of the Revenue Act of 1924.

It is deemed proper to add that attorneys for the estate have requested that a conference in the case be held in this office and that their request has been granted, with the understanding that the conference will be held upon return to this country of the administrator of the estate. The conclusion reached hereinbefore is based upon such information, as is now in the possession of this office and is deemed to be well supported by the court decisions cited. However, it is of course possible that the attorneys and administrator may produce evidence warranting a different conclusion. So the conclusion reached should be considered as subject to change if, as, and when, additional evidence is produced which would justify this office in reaching a different conclusion favorable to the estate.

(Signed) Robert H. Jackson, R. H. J., A. H. K., Assistant General Counsel for the Bureau of Internal Revenue.

[fol. 40] EXHIBIT "D" TO SUPPLEMENTAL STIPULATION  
(No. 1)

GC:AHK.  
A-282188.

April 8, 1935.

#### Memorandum for Mr. Oliphant

In re Charles Henry Sanford Estate, Freehold, New Jersey

Mr. Coolidge wishes to see a copy of our final ruling in this case because of his conversations relative to it with the British Ambassador. Two copies are attached hereto, one for your own files and one for transmission to Mr. Coolidge if you so desire.

I have given the case careful personal attention and sat in on the conference with the attorneys for the trustee and the estate. I am now convinced that the position tentatively taken in the prior opinion should not be maintained, and that its possible prejudicial results upon the revenues both from gift tax and income tax far outweigh the considerable revenue we would gain from asserting a gift tax liability against this trust. Even though we won in the courts,

which seems unlikely under the present statutes and regulations, our victory would be a Pyrrhic one.

(Sgd.) Arthur H. Kent, Assistant to Assistant General Counsel for the Bureau of Internal Revenue.

Enc. 2cc opinion.

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[fol. 41] EXHIBIT "E" TO SUPPLEMENTAL STIPULATION  
(No. 1)

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to MT-ET-GT-Cl-25-1st New Jersey.

Donor—Charles Henry Sanford.

Apr. 19, 1935.

Joseph McDermott, Administrator, Freehold, New Jersey

SIR:

The gift tax return filed on Form 706-A for the calendar year 1924 in behalf of Charles Henry Sanford, deceased December 22, 1928, has been examined in connection with the information of record.

The examination discloses no gift tax liability. Accordingly, the case has been marked closed in so far as the Federal gift tax is concerned.

Respectfully, D. S. Bliss, Deputy Commissioner.

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[fol. 42] EXHIBIT "F" TO SUPPLEMENTAL STIPULATION  
(No. 1)

GC:I:REC.  
A-282188.

Oct. 14, 1937.

G. C. M. 19260

In re Charles Henry Sanford Estate, Freehold, New Jersey

Deputy Commissioner Bliss:

In your memorandum dated September 30, 1937 (MT-DC-ET-GT-25-24-1st New Jersey), relating to the above-named

case, attention is invited to the opinion rendered in the case of *Hesslein v. Hoey* (C. C. A. 2nd — 1937) — Fed. (2d) —, in order that this office may advise you “as to whether [in view of that opinion] the Sanford [i. e., the Charles Henry Sanford] gift tax case should be reopened by the issuance of a ninety-day letter.”

The facts in the Sanford case are set forth in G. C. M. 14774 substantially as follows: Charles Henry Sanford who died December 22, 1928, created certain trusts in December, 1913, reserving to himself the right to terminate or modify any or all of the trusts. On November 26, 1919, he relinquished the right to terminate but reserved to himself the right to modify all of them, provided, however, that such right of modification should not in any way be construed to include any right in Mr. Sanford to withdraw principal or income from any trust. On August 21, 1924, or after the enactment of the Revenue Act of 1924, which for the first time imposed a tax upon transfers by gift, the settlor renounced all right to modify the trusts.

The question involved in G. C. M. 14774, supra “is whether the renouncement of the right of Sanford to modify the trust . . . operated as a transfer of property by gift and was subject to tax”. In that G. C. M. this question is disposed of as follows:

“For the reasons indicated it is the opinion of this office that the gift in the instant case became effective on November [fol. 43] 26, 1919, when the said Sanford relinquished his right to terminate the trusts in question, and that as this transaction occurred before the gift tax law became effective it is not subject to the tax.”

Thus, G. C. M. 14774 holds in substance that the right to modify which Mr. Sanford renounced in August, 1924, did not cause the gift to be incomplete, and that, accordingly, the renunciation of such right could not and did not bring the gift within the ambit of the gift tax law. G. C. M. 14774 gives full effect to the regulations.

In the case of *Hesslein v. Hoey*, supra, it appears from the opinion rendered by the court that, in December, 1934, Mr. Hesslein, the plaintiff, voluntarily conveyed certain property to trustees to pay the income to named beneficiaries during the life of the trust, and upon its termination at the

death of the survivor of the settlor and his wife to distribute the principal among the persons named, or to those the settlor might appoint by will, if he should survive his wife. By the seventh article of the trust agreement the settlor reserved to himself the power to change the trustees, and by the tenth article the power to change the beneficiaries of income and principal and to alter the trust in any manner not beneficial to the settlor or his estate.

The question presented in the Hesslein case, as shown by the opinion, "is whether the creation of a trust for donee beneficiaries, in which the settlor reserves the power to alter the trust in any manner not beneficial to himself or his estate, is a transfer subject to the Federal gift tax under the Revenue Act of 1932, as amended".

In disposing of this question the court said, among other things:

"In our opinion, for the reasons already stated, section 501 was not intended to impose a gift tax with respect to the [fol. 44] corpus of such a trust as the plaintiff created in 1934. If during his life he shall terminate his reserved powers, gift tax will then accrue. If they are terminated by his death, the property will be subject to an estate tax."

Thus, the court substantially holds in its opinion that the power which Mr. Hesslein has reserved to alter the trust renders the gift incomplete.

Since the opinion in the Hesslein case is contrary to article 3 of Regulations 79 (1936 edition), this office recommended in August, 1937, that a petition for certiorari be filed. However, the Department of Justice has not yet filed such a petition nor has it advised this office as to what action it will take in that regard. The time for filing will expire October 26, 1937.

Inasmuch as there is no certainty that a petition for certiorari will be filed in the Hesslein case, or if filed that it will be granted, or if filed and granted that the opinion of the lower court will be reversed, you are advised that in the opinion of this office a ninety-day letter should be issued relative to the gift tax imposed in respect of the transfer made by Mr. Sanford. G. C. M. 14774 is hereby revoked.

It appears from your memorandum that the time for issuing such a letter will expire October 18, 1937.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Oct. 14, 1937.

Approved: (Signed) Chas. T. Russell, Acting Commissioner.

Approved: (Sgnd.) Roswell Magill, Undersecretary.

[fol. 45] BEFORE UNITED STATES BOARD OF TAX APPEALS

SUPPLEMENTAL STIPULATION No. 2—Filed February 15, 1938

It is stipulated by and between counsel for the respective parties that if T. J. Coolidge, who was Under Secretary of the Treasury from May 2, 1934, to February 15, 1936, were called as a witness by the petitioner he would testify as more particularly set forth in his letter addressed to John P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., dated February 10, 1938, attached hereto as Exhibit "G."

William A. Carr, Montgomery B. Angell, Attorneys for Petitioner. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[fol. 46] EXHIBIT "G" TO SUPPLEMENTAL STIPULATION (No. 2)

(Copy)

Sixty Seven Milk Street, Boston, Massachusetts

February Ten, 1938.

Mr. John P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

DEAR MR. WENCHEL:

I understand that a question has arisen as to whether, while I was Under Secretary of the Treasury in 1935, I approved a certain gift tax ruling made by Assistant General



Counsel of the Bureau of Internal Revenue involving the Estate of Charles Henry Sanford.

I recall the matter very definitely, for I had several talks with the British Ambassador, who was interested on account of the interest which certain of the British beneficiaries under the Sanford Trust had in the case.

I remember discussing the matter at some length with counsel of the Treasury. I assured myself that the ruling concerned was made with care and careful consideration of the law and while I did not undertake to pass personally upon the legal merits of the case the ruling seemed just and received my approval.

Yours very truly, (S.) T. J. Coolidge.

[fol. 47] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 91847

Estate of CHARLES HENRY SANFORD, Dec'd; JOSEPH McDERMOTT, Administrator, C. T. A., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Montgomery B. Angell, Esq., and Otis T. Bradley, Esq., for the petitioner.

Lewis S. Pendleton, Esq., for the respondent.

MEMORANDUM OPINION—Rendered April 13, 1938

MURDOCK:

The Commissioner determined a deficiency of \$1,000,745 in federal gift tax due from the deceased donor, Charles Henry Sanford, for the calendar year 1924. The petitioner contends that no taxable gift was made in 1924 and, on the contrary, the donor had made a transfer of the property in question by way of a gift prior to 1924. The facts have been introduced into the record by stipulations and the Board adopts those stipulations as the facts for all purposes of this proceeding.

Charles Henry Sanford executed a trust indenture on December 24, 1913, whereby he created certain trusts and named the Guaranty Trust Company of New York as trustee. Four of the trusts thus created are involved in the

present proceeding. Sanford retained in that instrument [fol. 48] the right to terminate or modify any or all of the trusts. He, thereafter from time to time up to August 21, 1924, made certain changes in the trusts, and on two occasions changed his reserved power to terminate or modify. The first of these latter changes was made on November 26, 1919, when he surrendered the power to terminate the trusts. He retained thereafter the right to modify the trusts "but this right of modification, however, shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument." The final change was made on August 21, 1924 when he formally renounced all rights to further modify the terms of the trusts, and surrendered all such rights reserved by him in the original instrument or in supplements thereto.

Sanford did not file a gift tax return for the year 1924. He died in 1928 while residing in New Jersey. His administrator, after a revenue agent had raised the question of whether the surrender of the power to modify in 1924 subjected the transfer to a gift tax at that time, filed a gift tax return for the year 1924 with the Collector of Internal Revenue for the District of New Jersey. The property held by the trustee on August 21, 1924 was listed in the return, but the administrator, on behalf of the estate, on that return disclaimed any liability for gift tax. Conferences were thereafter held between representatives of the taxpayer and representatives of the government. The Bureau ruled that the transfer became effective on November 26, 1919, when Sanford relinquished his right to terminate the trust, and, since the trust was made before the gift tax law became effective, it was not subject to the latter tax. This was approved by the Under-Secretary of the Treasury, and the petitioner was notified in April, 1935, that the gift tax return [fol. 49] for 1924 disclosed no tax liability and the case had been marked closed. However, the case was reopened in the Bureau after the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Hesslein v. Hoey*, 91 Fed. (2d) 954. The Commissioner then mailed the notice of deficiency in this case.

The petitioner contends that the gift tax is imposed at the time that the transferor relinquishes all power to revest in himself title to the property transferred. He points out that the Bureau has so interpreted the act for

about thirteen years and he argues that it should be so construed. He says that the decision in *Hesslein v. Hoey* is erroneous and the denial of certiorari is not an indication of the view of the Supreme Court on the question. The government prior to the decision in *Hesslein v. Hoey* believed that it did not have to wait until a donor had relinquished all power to modify or change the terms of a trust but could collect the tax as soon as the donor had relinquished all right to revest title to the transferred property in himself. But after it argued that point unsuccessfully in *Hesslein v. Hoey*, it took the opposite view in the present case. Nevertheless it maintained its original position in another proceeding before the Board. *Harriet W. Rosenau*, 37 B. T. A. (3/13/38). The Board there considered the identical question which is involved in the present proceeding. The grantor there created an irrevocable trust in 1934 and provided that the corpus and any accumulated income should be distributed at her death as she should "by written instrument in the nature of a testamentary document direct, limit and appoint, without making such corpus or undistributed accumulated income therefrom part of the Settlor's estate." If she failed to exercise the reserved power just mentioned, the estate was to be divided, after the death of her son, among her issue. The [fol. 50] Board there considered all of the arguments which the petitioner has presented in this case and decided, with only two Members dissenting, to follow the decision of *Hesslein v. Hoey*, and held that there was not a transfer subject to gift tax so long as the donor reserved the power to change the beneficiaries. The present case is not distinguishable in principle from the *Rosenau* and *Hoey* cases. In each of these cases the donor had transferred his property and had retained no power to revest title to the property in himself, yet it was held that the gift was incomplete and not subject to tax at that time. Sanford had transferred his property and in 1919, relinquished all power to revest title to any of that property in himself, but he retained some control over the property, through his power to modify, until he relinquished that power in 1924. Therefore, following the *Rosenau* and *Hoey* cases, his gift was not complete until 1924 and is subject to the gift tax in that year.

Decision will be entered for the respondent.

## BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION—Entered April 14, 1938

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered April 13, 1938, it is,

Ordered and Decided: That there is a deficiency in gift tax for the calendar year 1924 in the amount of \$1,000,745.  
(Sgd.) J. E. Murdock, Member.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REVIEW—Filed April 28, 1938

To the Honorable Judges of the United States Circuit  
Court of Appeals for the Third Circuit:

Joseph McDermott, as Administrator cum testamento annexo of the estate of Charles Henry Sanford, deceased, being aggrieved by the decision of the United States Board of Tax Appeals entered on April 14, 1938, wherein the Board ordered and decided that there is a deficiency in federal gift tax for the calendar year 1924 due from the petitioner as administrator c. t. a. of the aforesaid estate in the amount of \$1,000,745, by his attorney, Montgomery B. Angell, respectfully shows unto this Honorable Court as follows:

## I. Designation of Court of Review

The petitioner is a citizen of the United States and a resident of Freehold, New Jersey. He is the duly qualified and acting administrator c. t. a. of the estate of Charles Henry Sanford, deceased. The said Charles Henry Sanford died a resident of Monmouth County, New Jersey, on [fol. 52] December 22, 1928. After his death, the petitioner, as administrator of the said estate, made a federal gift tax return for the calendar year 1924 and duly filed it in the office of the Collector of Internal Revenue for the District of New Jersey located in Newark, New Jersey, and within the jurisdiction of the Circuit Court of Appeals for the Third Judicial Circuit.

## II. Statement of the Nature of the Controversy

The taxes in controversy are federal gift taxes on account of an alleged gift made by the decedent in 1924. They amount to \$1,000,745, all of which are in dispute.

The Commissioner of Internal Revenue notified the petitioner of the alleged deficiency in gift taxes for 1924 by a notice of deficiency dated October 16, 1937, issued pursuant to the provisions of Section 318 (a) of the Revenue Act of 1926, and Section 308 (a) of the Revenue Act of 1926, as amended by Section 501 of the Revenue Act of 1934. Within the period allowed by law, the petitioner filed his appeal to the United States Board of Tax Appeals. On April 13, 1938, the Board promulgated its opinion, and on April 14, 1938, entered its final order and decision in the said appeal, wherein and whereby the Board ordered and decided that there is a deficiency in gift tax for the calendar year 1924 in the amount of \$1,000,745.

The case was presented to the Board of Tax Appeals upon stipulations of fact which raised a single issue, namely, the propriety of the Commissioner's determination that the relinquishment by Charles Henry Sanford, the deceased, on August 21, 1924, of a bare power to modify certain trusts, as distinguished from the power to revest in himself the income or corpus of the trust which was surrendered in 1919, [fol. 53] constituted a taxable gift in 1924 within the meaning of Section 319 of the Revenue Act of 1924. The facts with respect to this question are as follows:

On December 24, 1913, Charles Henry Sanford executed a trust indenture by which he created certain trusts of which the Guaranty Trust Company of New York was designated trustee. Four of these trusts are here involved. The indenture of December 24, 1913, after providing for the disposition of the income and principal of the property transferred in trust, provided as follows:

"The party of the first part [Charles Henry Sanford] however, reserves the right to terminate or modify any or all of the trusts herein created by a suitable instrument in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part [Guaranty Trust Company of New York]."



Pursuant to the power reserved under the foregoing provision, Charles Henry Sanford from time to time made certain amendments to the trusts, the last of which was made on August 21, 1924. Two of these amendments involved changes in the aforesaid reserved power.

By a supplemental indenture dated November 26, 1919, Charles Henry Sanford surrendered the power to terminate the trusts here involved or to revest in himself all or any part of the property held in such trusts, and retained only the power to modify such trusts in other respects. After reciting the above-quoted provision of the instrument of December 24, 1913, and that the settlor desired to modify such provision, the said supplemental indenture contained the following:

[fol. 54] "Now Therefore, the party of the first part does hereby modify the same so that the said clause shall read as follows:

'The party of the first part, however, reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York, and filed with the party of the second part; but this right of modification, however, shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created this instrument.'

In all respects, save as modified by this supplemental indenture and the supplemental indentures hereinbefore referred to, the said Indenture of December 24, 1913, is hereby reaffirmed."

The power of modification set forth in the aforesaid supplemental indenture of November 26, 1919, remained unchanged until August 21, 1924. By a supplemental indenture executed on the latter date, Charles Henry Sanford renounced and surrendered all his rights to further modify the terms of the trusts here involved in the following language:

"The party of the first part [Charles Henry Sanford] hereby renounces all rights to further modify the terms of the said trusts or any of them and does hereby surrender all such rights reserved to him by the indenture of Decem-

ber 24th, 1913, and by the various indentures supplemental thereto."

Charles Henry Sanford did not file a gift tax return for the year 1924. He died a resident of New Jersey on December 22, 1928, and thereafter petitioner was appointed administrator c. t. a. of his estate. In the early fall of 1934, [fol. 55] a revenue agent, in an interview with the petitioner, raised the question as to whether the surrender of the power of modification on August 21, 1924, was subject to gift tax. Following this interview petitioner, on August 22, 1934, filed with the Collector of Internal Revenue for the District of New Jersey, in Newark, New Jersey, a gift tax return on behalf of the estate of Charles Henry Sanford for the year 1924, listing the property held by the trustee in the trusts on August 21, 1924, but disclaiming any liability for a gift tax. The aggregate value of such property on that date was \$6,846,225.06 as stipulated for the purposes of this proceeding.

Following the filing of this return, conferences were held in the Bureau of Internal Revenue between representatives of the petition and representatives of the Government with respect to the question of liability for gift tax. Following these conferences the Assistant General Counsel of the Bureau of Internal Revenue ruled that the gift became effective on November 26, 1919, when Sanford relinquished his right to terminate the trusts, and that since the gift was complete before the gift tax law became effective, it was not subject to the tax. This ruling was approved by the Under-Secretary of the Treasury. On April 19, 1935, the petitioner was formally notified by the Commissioner that the gift tax return for the year 1924 disclosed no tax liability and that the case had been marked closed.

On July 26, 1937, the Circuit Court of Appeals for the Second Circuit decided the case of *Hesslein v. Hoey*, 91 F. (2d) 954, the decision being against the Government and in favor of the taxpayer. Following the decision in the *Hesslein* case, the Bureau of Internal Revenue reopened the Sanford Estate case, and by notice of deficiency dated October 16, 1937, notified the petitioner that the relinquishment by Sanford of his power of modification on August 21, 1924, [fol. 56] constituted a taxable gift, and asserted the deficiency of 1,000,745 here in controversy. From this notice

of deficiency the petitioner appealed to the Board of Tax Appeals.

After hearing the appeal, the Board of Tax Appeals sustained the Commissioner's determination as set forth in the notice of deficiency, and held, upon the authority of the cases of *Hesslein v. Hoey*, 91 F. (2d) 954 (C. C. A. 2d) and *Harriet W. Rosenau*, 37 B. T. A. —, decided March 15, 1938, that the relinquishment by Sanford on August 21, 1924, of his power of modification constituted a taxable gift to the extent of the value on that date of the property held in the trusts here involved, despite the fact that on November 26, 1919, Sanford had surrendered any and all power to terminate the trusts or to revest in himself or his estate the income or the corpus of the trusts.

### III. Assignments of Error

In making its decision as aforesaid, the Board of Tax Appeals committed the following errors upon which the petitioner relies as the basis of this proceeding:

1. The Board erred in holding that the relinquishment by Sanford on August 21, 1924, of the bare power to modify the trusts here involved constituted a transfer in 1924 of property by gift within the meaning of Section 319 of the Revenue Act of 1924, when on November 26, 1919, Sanford already had surrendered any and all power to revest in himself or his estate the corpus or the income of such trusts.

2. The Board erred in failing to hold that since Sanford on November 26, 1919, had relinquished all power to revest in himself all or any part of the principal or income of the trusts here involved, no taxable transfer or gift occurred [fol. 57] or could have occurred on August 21, 1924, when he relinquished the remaining power to modify the aforesaid trusts.

3. The Board erred in holding that where the settlor of certain trusts surrendered any and all power of revocation many years prior to the enactment of any Federal Gift Tax Act, reserving only the power to modify the terms of the trust, which reserved power did not include the right to revest in himself or his estate any of the income or principal of such trusts, the surrender of the bare right to modify in a subsequent year when a Federal gift tax was in effect

subjected the settlor and his estate to a gift tax measured by the value of the trust property at the time the power of modification was finally surrendered.

4. The Board erred in finding a deficiency in gift tax due from the petitioner for the calendar year 1924 in the amount of \$1,000,745, or in any amount whatsoever.

5. The Board erred in failing to find that there is no deficiency in gift tax due from the petitioner for the calendar year 1924.

Wherefore, your petitioner prays that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Third Circuit, that a transcript of the record be prepared in accordance with law and with the rules of the said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court, and to the entry of such further order or orders as shall by this Court be deemed meet and proper.

(Sgd.) Montgomery B. Angell, Attorney for the  
Petitioner, 15 Broad Street, New York, N. Y.

[fol. 58] *Duly sworn to by Montgomery B. Angell. Jurat omitted in printing.*

[fol. 59] BEFORE UNITED STATES BOARD OF TAX APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed April 28, 1938

To Commissioner of Internal Revenue, Washington, D. C.,  
J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that the petitioner, on the twenty-eighth day of April, 1938, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C.; a petition for review by the United States Circuit Court of Appeals for the Third Circuit to review the decision of the Board of Tax Appeals heretofore rendered in the above-entitled cause. A copy of the petition for review and the

assignments of error as filed is hereto attached and served upon you.

Dated April 28, 1938.

(Sgd.) Montgomery B. Angell, Attorney for the Petitioner, 15 Broad Street, New York, N. Y.

Receipt of the foregoing notice of filing and service of a copy of the petition for review and assignments of error is hereby acknowledged this twenty-eighth day of April, 1938.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

[fol. 60] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

#### STATEMENT OF EVIDENCE—Filed April 28, 1938

The above-entitled cause came on for hearing on February 15, 1938, before Honorable J. Edgar Murdock, Member of the United States Board of Tax Appeals at Washington, D. C., pursuant to a notice of hearing theretofore given, and thereupon the following proceedings were had and the parties by their attorneys submitted the following evidence:

#### Appearances:

Montgomery B. Angell, Otis T. Bradley and William A. Carr, appearing on behalf of the petitioner;

Lewis S. Pendleton (Honorable Herman Oliphant, General Counsel for the Department of the Treasury) appearing on behalf of the Commissioner of Internal Revenue, respondent.

[fol. 61] The opening statement for the petitioner was made by Mr. Angell.

The opening statement for the respondent was made by Mr. Pendleton.

At the hearing, the petitioner offered, and the Board admitted in evidence without objection by the respondent, the following stipulations of fact:

1. Main stipulation entitled "Stipulation of Facts," with Annex A attached thereto.



2. Supplemental Stipulation No. 1, with Exhibits B, C, D, E and F attached thereto.

3. Supplemental Stipulation No. 2, with Exhibit G attached thereto.

In addition, at the hearing the following oral stipulations were made by counsel:

Mr. Pendleton: If your Honor please, there is one other matter I have asked counsel for the petitioner to stipulate, and that is in reference to whether the Bureau included these trusts for estate tax purposes. Mr. Sanford died in 1928, and I have asked the petitioner to stipulate whether this property was included and the tax paid, the additional estate tax paid, on those trusts, which he very kindly consented to do.

Mr. Angell: In addition to the three stipulations already offered and accepted, it is hereby stipulated by and between the parties to this appeal, by their respective attorneys, that in respect of the estate tax of Charles H. Sanford the question of the inclusion of the corpus of the trusts here involved in this estate was raised by the Bureau in auditing the estate tax return. A case was made, and after full consideration, the Bureau of Internal Revenue ruled that the corpus of these trusts was not includable as part of [fol. 62] the gross estate, and the corpus was therefore excluded in closing the estate tax case.

Mr. Pendleton: That is correct.

The Member: When did Mr. Sanford die?

Mr. Angell: In 1928, your Honor.

Mr. Angell: Now, the purpose of this stipulation (i. e., Supplemental Stipulation No. 2), your Honor, was to relieve Mr. Coolidge of the burdensome trip from Boston to Washington. It was the intention of the parties, the Government and myself, that the statements made in that letter, which is attached as Exhibit G, may be accepted in evidence in lieu of Mr. Coolidge's testimony, with the same force and effect. That is the case, is it not, Mr. Pendleton?

Mr. Pendleton: That is correct.

Whereupon both the petitioner and the respondent rested.

Approved and ordered filed this twenty-eighth day of April, 1938.

(Sgd.) J. E. Murdock, Member, United States Board of Tax Appeals.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT

[Title omitted]

STIPULATION REGARDING STATEMENT OF EVIDENCE

It is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the foregoing statement of evidence, including the stipulations of fact and the exhibits attached thereto filed February 15, 1938 is a statement of all the material evidence adduced at the hearing before the United States Board of Tax Appeals, and the same is approved by the undersigned as attorney for the petitioner and by the undersigned, John P. Wenchel, as attorney for the Commissioner of Internal Revenue, respondent, on review.

Montgomery B. Angell, Attorney for Petitioner on Review. J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, Attorney for Respondent on Review.

[fol. 64] BEFORE UNITED STATES BOARD OF TAX APPEALS

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed April 28, 1938

To Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Third Circuit heretofore filed by the above-named petitioner:

1. Docket entries of the proceedings before the Board of Tax Appeals.
2. Pleadings before the Board of Tax Appeals as follows:
  - (a) Petition for redetermination;
  - (b) Answer of the respondent.
3. Order of the Board of Tax Appeals amending the caption, entered January 27, 1938.
4. The following stipulations of fact:

(a) Main stipulation entitled "Stipulation of Facts" with Annex A attached thereto;

(b) Supplemental Stipulation No. 1 with Exhibits B, C, D, E and F attached thereto;

(c) Supplemental Stipulation No. 2 with Exhibit G attached thereto;

5. Statement of evidence.

6. Memorandum opinion of the Board of Tax Appeals entered April 13, 1938.

[fol. 65] 7. The decision and order of the Board of Tax Appeals entered April 14, 1938.

8. The petition for review.

9. Notice of filing of the petition for review, with admission of service thereof.

10. This praecipe.

11. Notice of filing of this praecipe, with admission of service thereof.

Dated April 28, 1938.

Montgomery B. Angell, Attorney for the Petitioner,  
15 Broad Street, New York, N. Y.

Service of a copy of this praecipe is hereby admitted this twenty-eighth day of April, 1938.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

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[fol. 66] BEFORE UNITED STATES BOARD OF TAX APPEALS

NOTICE OF FILING PRAECIPE—Filed April 28, 1938

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

Please Take Notice that on the twenty-eighth day of April, 1938, the undersigned filed with the Clerk of the United States Board of Tax Appeals a praecipe designating the portions of the record to be transmitted to the Circuit Court of Appeals for the Third Circuit on the appeal taken in the above-entitled cause, a copy of which praecipe is hereto annexed.

Dated: April 28, 1938.

Montgomery B. Angell, Attorney for the Petitioner,  
15 Broad Street, New York, N. Y.

Service and receipt of a copy of the foregoing notice and copy of praecipe annexed is hereby acknowledged this twenty-eighth day of April, 1938.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

[fols. 67-68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] ANNEX "A" TO STIPULATION OF FACTS

Guaranty Trust Company of New York as Trustee under Indenture of Trust Created by Charles Henry Sanford on December 24, 1913

And Modifications:

1. February 15, 1916.
2. September 6, 1916.
3. August 17, 1917.
4. December 19, 1917.
5. June 28, 1918.
6. August 16, 1918.
7. May 23, 1919.
8. November 26, 1919.
9. March 16, 1920.
10. November 25, 1921.
11. November 20, 1922.
12. December 21, 1923.
13. March 10, 1924.
14. August 21, 1924.

[fol. 70] This indenture, made the 24th day of December, in the year One thousand nine hundred and thirteen, between Charles Henry Sanford, of Freehold, Monmouth County, in the State of New Jersey, party of the first part, and Guaranty Trust Company of New York, party of the second part,

Witnesseth:

That the said party of the first part, for and in consideration of the sum of One Dollar to him in hand paid by the party of the second part and for divers other good causes

and considerations, Has granted, bargained, sold, assigned, transferred and set over and by these presents Does grant, bargain, sell, assign, transfer and set over unto the party of the second part and to its successors and assigns, the property described in a Schedule hereto annexed, marked "Schedule A" and signed by the party of the first part, together with all and singular the estate, interest, property, claim and demand of the party of the first part thereunto belonging or in any wise appertaining.

To Have and to Hold the same to the said party of the second part, and its successors, subject to the payment with interest to the party of the second part of the present indebtedness of the party of the first part to it, to be paid in the manner hereinafter stated, and in that manner only, upon the following trusts, that is to say:

To collect and receive the interest, income and profits thereof and out of the said income to pay in equal quarter yearly installments the following annuities to the following named annuitants during their respective natural lives except as hereinafter provided, namely:

To Emily Austin Sanford, the wife of the said Charles Henry Sanford, an annuity of Fifty thousand Dollars (\$50,000) to be paid in full in priority to all other payments of income herein directed, but not to commence until after the said debt of the party of the first part to the party of the second part is paid.

To William A. Sanford, a brother of the said Charles Henry Sanford, and to Mary Elizabeth Sanford, his wife, jointly, and to the survivor of them, an annuity of Three thousand Dollars (\$3,000) for their joint benefit during their [fol. 71] joint lives, and to their daughter, Delia Sanford, an annuity of Five hundred Dollars (\$500), and from and after the death of the survivor of said William A. Sanford and Mary Elizabeth Sanford, the said annuity to their said daughter, Delia Sanford, to be increased to One thousand Dollars (\$1,000).

To Sarah Elizabeth Wyckoff, a sister of the said Charles Henry Sanford, an annuity of Three thousand Dollars (\$3,000) and from and after the death of said Sarah Elizabeth Wyckoff, to her daughter, Mabel Wyckoff, an annuity of One thousand Dollars (\$1,000).

To Grace Harvey, a daughter of said Sarah Elizabeth Wyckoff, an annuity of One thousand Dollars (\$1,000) for the support of herself and of her two children now living.



and after her death or re-marriage to the said two children in equal shares and to the survivor of them.

To Mary Anna Miller, a sister of the said Charles Henry Sanford, an annuity of Three thousand Dollars (\$3,000).

To Frederick J. Sanford, a nephew of the said Charles Henry Sanford, and a son of his brother Jacob Sanford, and to his wife, jointly, and to the survivor of them, an annuity of Two thousand Dollars (\$2,000) for the purpose of aiding in the support of the mother, sister and brothers of said Frederick J. Sanford; this annuity, however, except as hereinafter stated, to terminate only upon the death of the survivor of the said Frederick J. Sanford and his wife.

Provided, however, that if any of said annuitants shall survive all of the grandchildren hereinafter mentioned of said Charles Henry Sanford, the annuity of such survivor or survivors, unless such survivor be Emily Austin Sanford, shall cease upon the death of the last survivor of said grandchildren.

And upon further trust, to set apart securities of the par value of One hundred and fifty thousand Dollars (\$150,000), and to collect and receive the income thereof and accumulate the said income for the benefit of Colville Herbert Sanford Barclay, a great-grandson of the said Charles Henry Sanford, until the said Colville Herbert Sanford Barclay shall attain the age of twenty-one years, and then to pay over to him the said sum of One hundred and fifty thousand Dollars (\$150,000) and all accumulations of said [fol. 72] income, and if he shall die before attaining the age of twenty-one years, then upon his death to pay over the said trust fund and all accumulations thereof to his eldest brother then living, and if there shall be no brother of his living at that time, then to pay over and distribute the said principal sum and all accumulated income thereof to and among the nephews and nieces then living of the said Charles Henry Sanford, in equal shares and to the children of any deceased nephew or niece, per stirpes and not per capita, the share which would have been taken by such deceased nephew or niece if living, except that the share of Addison Star Sanford, one of said nephews shall be paid to his wife, or if she be dead, to her children.

And upon further trust, to divide the residue of the said trust property into five (5) equal shares and to set apart and designate one share for each of the following named

grandchildren of the said Charles Henry Sanford, to wit: Sarita Enriqueta Barclay, wife of Colville Barclay, Georgiana Frances Phipps, wife of Eric Phipps, Charles Sanford Ward, Herbert Sanford Ward and Roger Casement Ward, and after deducting from the income of each share until the trust herein created in respect to it shall terminate, an equal proportion of the annuities hereinbefore given and the expenses and commissions of said Trustee, to apply the residue of the net income of each share to the use of the said grandchild for whom it shall be so set apart and designated during the time of her or his natural life, making payment thereof in equal quarter yearly installments,—except that, until the payment in full of said indebtedness of the party of the first part to the party of the second part hereinbefore mentioned, with interest, the said party of the second part shall reserve and apply to the payment of the said indebtedness all the net income of each of said shares during the term of said several trusts after payment of said annuities and expenses and commissions of said trustee and after applying annually out of the said income of her share to the use of Sarita Enriqueta Barclay, the sum of Twenty-five thousand Dollars (\$25,000) and out of the income of her share to the use of Georgiana Frances Phipps, the sum of Twenty-five thousand Dollars (\$25,000) and out of the income of the share of each of said grandsons of said Charles Henry Sanford, to wit: Charles Sanford Ward, Herbert Sanford Ward and Roger Casement Ward, all of whom are now minors; the sum of Two thousand five hundred Dollars (\$2,500) annually, to the use of each of said minors by paying each of said sums during the minority of said grandchildren respectively to Sarita Sanford Ward; daughter of the said Charles Henry Sanford and to Herbert Fitz-Edwin [fol. 73] Ward, her husband, jointly, and to the survivor of them, for the support, maintenance and education of said minors and if any of the said grandsons of Charles Henry Sanford shall attain the age of twenty-one years before said indebtedness shall be paid in full, then after applying out of the said income of such grandson's share after he shall attain twenty-one years of age to his use the sum of Two thousand five hundred Dollars (\$2,500) per annum until said indebtedness shall be paid in full; and after the aforesaid indebtedness is paid, in case any grandson before that time shall have attained the age of twenty-one years but not

the age of twenty-five years, then to apply the net income of the share of such grandson after reserving its proper proportion of said annuities and of the expenses and commissions of the trustee to the use of said Sarita Sanford Ward and Herbert Fitz-Edwin Ward jointly and to the survivor of them until said grandson shall attain the age of twenty-five years and thereafter to apply to the use of such grandson the whole of the aforesaid net income of his share, and to continue to apply the sum of Two thousand five hundred Dollars (\$2,500) annually as aforesaid to the use of each of said grandsons who shall be minors when said indebtedness is paid in full as aforesaid during their respective minorities and to accumulate during his minority the residue of each such minor's share of income after making the proper reductions for the payment of said annuities and trustee's expenses and commissions, and as each such minor shall attain the age of twenty-one years, to pay over to him all of said accumulated income of the share of said trust property set apart or designated to him, and as each grandson shall attain twenty-one years of age thereafter to apply to the use of said Sarita Sanford Ward and Herbert Fitz-Edwin Ward, jointly, and to the survivor of them, all of the net income of his share of said property, after reserving the proper proportion of said annuities and trustee's expenses and commissions, until he shall attain the age of twenty-five years, and thereafter to apply to his use, after reserving the proper proportion of said annuities and trustee's expenses and commissions, all of the income of his share.

And upon further trust, upon the death of any of said grandchildren to pay over to the child or children of the one so dying, and, if more than one, in equal shares, and to their descendants, per stirpes and not per capita, the share of said property set apart or designated to or for the use of said deceased grandchild, being one-fifth of the property described in Schedule "A" hereto annexed, in whatever form it may be at that time invested including a like proportion of any additions thereto, but excepting the securities selected to constitute the said One hundred and fifty thousand Dollar (\$150,000) trust fund, reserving, however, from said share its proportionate amount of said indebtedness, if any there shall be at that time, and applying the same towards the payment of said indebtedness, with interest, and reserving also from such share its propor-

tionate amount of such fund as may be necessary, in the judgment of the said Trustee, to secure payment of the annuity hereinbefore given to Emily Austin Sanford until her death, and in the event that any of said grandchildren shall die without leaving any child or children or descendant surviving him or her, then to pay over and distribute the share of the one so dying to and among the nephews and nieces of said Charles Henry Sanford then surviving, and the child or children of any of the said nephews or nieces who shall previously have died leaving a child or children then surviving, so that all the children of any deceased nephew or niece shall take between them one share and each living nephew and niece one share, except that the share of Addison Star Sanford one of said nephews shall be paid to his wife, if living, and if she be dead to her children then living.

Provided always, nevertheless, that it shall be lawful for the party of the second part as Trustee as aforesaid and its successors to sell the whole or any part of the estate hereby granted and any property which may be hereafter added thereto as hereinafter provided, either at public or private sale, and to invest and reinvest the proceeds of said sale or any other money which may at any time come into its possession as trustee under this indenture; to change investments from time to time in its discretion; and it shall be lawful for the party of the second part to invest the said proceeds and said moneys in any securities which shall be recommended by the party of the first part in writing, as well as in such investments as may be permitted by law and to hold any or all securities forming part of the trust estate so long, as, in the judgment of the party of the second part, it may be deemed prudent so to do; and the proceeds of any sale and the securities and funds acquired or created by any such investments or reinvestments shall be held by the said Trustee and its successors in Trust in the same manner and in all respects and to the same extent as it holds the original trust property under this indenture, and the same shall be subject to all the trust limitations and contingencies as is hereinbefore mentioned, expressed and declared of and concerning the original trust property so sold or invested.

It is further understood and agreed that the party of the first part may, either in his lifetime or by last Will and Testament, add to the property described in Schedule A

[fol. 75] such other property as he may from time to time transfer to the party of the second part for that purpose, and that all such property so transferred in his lifetime shall be designated for such purpose by suitable description thereof in said Schedule A or in a supplemental Schedule, over the signature of the party of the first part and to be annexed hereto and shall thereupon become subject to all the trusts, powers and limitations hereinbefore expressed with regard to property described in said Schedule A.

It is further understood and agreed that all the income herein required to be distributed and paid over by the party of the second part shall be distributed in quarter yearly payments on the first day of January, April, July and October in each year, beginning on the first day of January, 1914, except that the annuity to Emily Austin Sanford shall not be payable until the first of said quarterly days following the payment of said indebtedness in full and except that the income herein required to be distributed and paid over by the party of the second part to Sarita Enriqueta Barclay and Georgiana Frances Phipps shall be distributed in quarter yearly payments on the first day of February, May, August and November in each year beginning on the first day of February, 1914.

It is further understood and agreed that the party of the second part shall receive in full for its compensation for acting as trustee of the trusts herein created, in addition to its necessary expenses, a commission at the rate of one per cent (1%) on the amount of all income received by it and a commission of one-quarter of one per cent ( $\frac{1}{4}$  of 1%) on each distribution or other payment of capital.

It is further understood and agreed that the party of the second part shall not be responsible for any diminution of the trust estate resulting from depreciation of securities or property in which it shall have been invested in good faith, and that it shall not be responsible for mistakes or errors in judgment but shall be responsible only for fraud or wilful misconduct of the party of the second part, its officers and agents.

The party of the first part, however, reserves the right to terminate or modify any or all of the trusts herein created by a suitable instrument in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part.



[fol. 76] The party of the second part hereby accepts the trusts hereinbefore created and agrees faithfully to perform the same.

In Witness Whereof, the party of the first part has hereunto set his hand and seal and the party of the second part has caused its corporate seal to be affixed and these presents signed by its President the day and year first above written.

C. H. Sanford. Guaranty Trust Company of New York, by A. J. Hemphill, President. (Seal.)

Attest: E. H. Hebbard, Secretary.

In presence of: — — —

The words "This annuity however, Except as hereinafter stated, to terminate only upon the death of the survivor of the said Frederick J. Sanford and his wife" interlined on the fourth page before Execution.

Edward R. Green. Levi S. Tenney.

STATE OF NEW YORK,

County of New York, ss:

On this 24th day of December, in the year One thousand nine hundred and thirteen, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Otto Paul, Notary Public 2968, New York County.  
N. Y. Reg. No. 5019.

[fol. 77] STATE OF NEW YORK,

County of New York, ss:

On the 24th day of December, in the year One thousand nine hundred and thirteen, before me personally came Alexander J. Hemphill, to me known, who, being by me duly sworn, did depose and say, that he resides in Spring Lake, New Jersey; that he is the President of the Guaranty Trust Company of New York, the corporation described in, and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Otto Paul, Notary Public 2968, New York County.  
N. Y. Reg. No. 5019.

[fol. 78]

## SCHEDULE "A"

Statement of Securities Referred to in the Foregoing Trust  
Deed

## Pounds Sterling

Par Value	Names of Securities
500,000	Central Argentine Rly. Cons. Ord. stk. (6%)
10,000	Brazil North Eastern Rly. debts. 6%
55,000	Angle Argentine Tramways debts. 4%
10,000	Angle Argentine Tramways 5%
4,940	Underground Elect. Rlys., London 4½%
5,000	New York Telephone, 1st mort. 4½%
80,000	City of Monte Vides 5%
10,000	Argentine Republic 4%
5,000	Uruguay 3½%
5,000	Chaplin Milne Grenfell & Co., Ltd. (4%)

684,940

## United States Currency

\$ 535,000	Missi. River & Bonne Terre Rly., 1st mort. skg. fund 5%
300,000	Southern Rly., develpt. & genl. mort. series A 4%
250,000	Cincinnati, Hamilton & Dayton Rly., 1st mort. 4%
250,000	Lake Shore Elect. Rly. genl. mort. 5%
250,000	Great Falls Power Co. 1st mort. skg. fund 5%
250,000	St. Louis Sth. Western Rly. 1st term. & unifying mort. 5%
250,000	Central States Elect. Corp. gold notes 5%
200,000	American Mechanics' Bdg. Assocn. Trenton mort. 6%
100,000	Central Arkansas & Eastern Rly. 1st mort. quar. 5%
100,000	Stephensville Nth. & Sth. Texas Rly. 1st mort. 5%
100,000	Chicago, Milwaukee & St. Paul Rly. 4%
50,000	New York Central Lines Equip. Trust 1910 4½%
50,000	New York Central Lines Equip. Trust 1910 4½%
50,000	Pittsburg & Shawmut Rly. 2 yr. notes 6%
50,000	Lake Shore & Michigan Southern Rly. debts. 4%
50,000	New York Central & Hudson River Rly. debts. 4%
50,000	Idaho & Washington Northern Rly. coupon notes 6%
25,000	Idaho & Washington Northern Rly. 1st mort. notes skg. fund, 5%
20,000	Guaranty Trust Co. of New York Shares
10,000	J. G. White Co. Incorp'd. Pref. Shares (100) 6%
5,000	Freehold Trust Co. Freehold Shares

\$2,970,000

C. H. Sanford.

[fol. 79] This Supplemental Indenture, made the 15th day of February, in the year one thousand nine hundred and sixteen, between Charles Henry Sanford, of Freehold, Monmouth County, in the State of New Jersey, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, party of the second part,

Witnesseth:

That, Whereas, by an indenture dated the twenty-fourth day of December, one thousand nine hundred and thirteen, between the parties hereto, the party of the first part did create various trusts in property of which the party of the second part was made Trustee; and,

Whereas, the said trust indenture between the parties hereto, dated December 24, 1913, contained the following provision:

"The party of the first part, however, reserves the right to terminate or modify any or all of the trusts herein created by a suitable instrument in writing execute under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part,"

Now, Therefore, and pursuant to the power reserved to the party of the first part by the aforesaid indenture, the party of the first part by this supplemental indenture does hereby terminate or modify such of the trusts created in the original indenture herein dated December 24, 1913, so far as they refer to the property described in said trust deed as the residue thereof which is directed to be divided into five equal shares, and the provisions thereof are hereby, as to such residue before referred to, modified to the same effect as though originally so described, so as to read as follows:

"And upon further trust, to divide the residue of the said trust property into five (5) equal shares and to set apart and designate one share for each of the following named grandchildren of the said Charles Henry Sanford, to wit: Sarita Enriqueta Barclay, wife of Colville Barclay, Frances Georgiana Phipps, wife of Eric Phipps, Charles Sanford Ward, Herbert Sanford Ward and Roger Casement Ward, and after deducting from the income of each share until the trust herein created in respect to it shall terminate, an equal

# MICRO CARD

TRADE

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22

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65

1081





proportion of the annuities hereinbefore given and the ex-  
 [fol. 80] penses and commissions of said Trustee, to apply  
 the residue of the net income of each share to the use of the  
 said grandchild for whom it shall be so set apart and design-  
 ated during the time of her or his natural life, making pay-  
 ment thereof in equal quarter yearly installments—except  
 that until the payment in full of said indebtedness of the  
 party of the first part to the party of the second part herein-  
 before mentioned with interest, the said party of the second  
 part shall reserve and apply to the payment of the said in-  
 debtedness all the net income of each of said shares during  
 the term of said several trusts after payment of said an-  
 nuities and expenses and commissions of said trustee and  
 after applying annually out of the said income of her share  
 to the use of Sarita Enriqueta Barclay, the sum of Twenty-  
 five thousand Dollars (\$25,000.) and out of the income of  
 her share to the use of Frances Georgiana Phipps, the sum  
 of Twenty-five thousand Dollars (\$25,000.) and out of the  
 income of the share of each of said grandsons of said Charles  
 Henry Sanford, to wit: Charles Sanford Ward, Herbert  
 Sanford Ward and Roger Casement Ward, all of whom are  
 now minors, the sum of Two thousand and five hundred  
 Dollars (\$2,500.) annually, to the use of each of said minors  
 by paying each of said sums during the minority of said  
 grandchildren respectively to Sarita Sanford Ward, daugh-  
 ter of the said Charles Henry Sanford and to Herbert Fitz-  
 Edwin Ward, her husband, jointly, and to the survivor of  
 them, for the support, maintenance and education of said  
 minors and if any of the said grandsons of Charles Henry  
 Sanford shall attain the age of twenty-one years before said  
 indebtedness shall be paid in full, then after applying out  
 of the said income of such grandson's share after he shall  
 obtain twenty-one years of age to his use the sum of Two  
 thousand five hundred Dollars (\$2,500.) per annum until  
 said indebtedness shall be paid in full; and after the afore-  
 said indebtedness is paid, in case any grandson before that  
 time shall have attained the age of twenty-one years but not  
 the age of twenty-five years, then to apply the net income of  
 the share of such grandson after reserving its proper pro-  
 portion of said annuities and of the expenses and commis-  
 sions of the trustee to the use of said Sarita Sanford Ward  
 and Herbert Fitz-Edwin Ward jointly and to the survivor  
 of them until said grandson shall attain the age of twenty-  
 five years and thereafter to apply to the use of such grand-



son the whole of the aforesaid net income of his share, and to continue to apply the sum of Two thousand five hundred Dollars (\$2,500.) annually as aforesaid to the use of each of said grandsons who shall be minors when said indebted- [fol. 81] ness is paid in full as aforesaid during their respective minorities and to accumulate during his minority the residue of each such minor's share of income after making the proper reductions for the payment of said annuities and trustees expenses and commissions, and as each such minor shall attain the age of twenty-one years, to pay over to him all of said accumulated income of the share of said trust property set apart or designated to him, and as each grandson shall attain twenty-one years of age thereafter to apply to the use of said Sarita Sanford Ward and Herbert Fitz-Edwin Ward, jointly, and to the survivor of them, all of the net income of his share of said property, after reserving the proper proportion of said annuities and trustees expenses and commissions, until he shall attain the age of twenty-five years, and thereafter to apply to his use, after reserving the proper proportion of said annuities and trustees expenses and commissions, all of the income of his share.

And upon further trust, upon the death of any of said grandchildren to pay over to the child or children of the one so dying, and, if more than one, in equal shares, and to their descendants, *per stirpes* and not *per capita*, the share of said property set apart or designated to or for the use of said deceased grandchild being one-fifth of the property described in Schedule "A" hereto annexed, in whatever form it may be at that time invested, including a like proportion of any additions thereto, but excepting the securities selected to constitute the said One hundred and fifty thousand Dollars (\$150,000.) trust fund, reserving, however, from said share its proportionate amount of said indebtedness, if any there shall be at that time, and applying the same towards the payment of said indebtedness, with interest, and reserving also from such share its proportionate amount of such fund as may be necessary, in the judgment of the said Trustee, to secure payment of the annuity hereinbefore given to Emily Austin Sanford until her death, and in the event that any of said grandchildren shall die without leaving any child or children or descendant surviving him or her, then to pay over the share of the one so dying to the party of the first part hereto should he be living, and, if dead, to his legal representatives."

By this supplemental indenture it is not proposed to modify, alter or revoke any other trust or trusts than the ones affected by the modification contained in this instrument, and any and all the various provisions and conditions of the said trusts are hereby in all respects reaffirmed and ratified, specifically including the right of the party of the [fol. 82] first part by a further suitable instrument to terminate or modify any or all of the trusts originally created or hereby modified in the same manner as is described in the indenture dated December 24, 1913.

In Witness Whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be affixed and these presents to be signed by its President, the day and year first above written.

C. H. Sanford (L. S.). Guaranty Trust Company of New York, by Charles H. Sabin, President.

Attest: E. H. Hebbard, Secretary.

STATE OF NEW YORK,  
County of New York, ss:

On the 15th day of February, in the year One thousand nine hundred and sixteen, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

H. F. Wortham, Notary Public. Notary Public, New York County. New York County Clerk's No. 323. New York Register's No. 7279. My Commission Expires March 30, 1917.

(Seal)

[fol. 83] STATE OF NEW YORK,  
County of New York, ss:

On this 15th day of February, in the year One thousand nine hundred and sixteen, before me personally came Charles H. Sabin, to me known, who, being by me duly sworn, did depose and say, that he resides in the Borough of Manhattan, City of New York, and is the President of Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument;

that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

H. F. Wortham, Notary Public, Notary Public, New York County. New York County Clerk's No. 323. New York Register's No. 7279. My Commission Expires March 30, 1917.

(Seal)

[fol. 84] This Supplemental Indenture, made the 6th day of September, in the year One thousand nine hundred and sixteen, between Charles Henry Sanford, of Freehold, Monmouth County, in the State of New Jersey, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, party of the second part,

Witnesseth:

That, Whereas, by an indenture dated the twenty-fourth day of December, One thousand nine hundred and thirteen, between the parties hereto, the party of the first part did create various trusts in property of which the party of the second part was made Trustee; and,

Whereas, the said trust indenture between the parties hereto, dated December 24, 1913, contained the following provision:

"The party of the first part, however, reserves the right to terminate or modify any or all of the trusts herein created by a suitable instrument in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with party of the second part";

and

Whereas, by supplemental indenture dated the 15th day of February, 1916, made between the said Charles Henry Sanford, as party of the first part, and Guaranty Trust Company of New York, as party of the second part, the said Charles Henry Sanford modified in certain respects certain of the trusts created by said indenture of December 24, 1913;

and

Whereas, the said Charles Henry Sanford desires by this instrument further to modify certain of the trusts created by said indenture dated December 24, 1913,

Now, Therefore, and pursuant to the power reserved to the party of the first part by the aforesaid indenture of December 24, 1913, the party of the first part by this supplemental indenture does hereby modify such of the trusts created in the original indenture herein dated December 24, 1913, so far as they refer to the powers of the trustee to make or retain investments, and the provisions of said indenture of December 24, 1913, relating to said powers are hereby modified to the same effect as though originally so made and described so as to read as follows:

[fol. 85] Provided Always, nevertheless, that it shall be lawful for the party of the second part as trustee, as aforesaid, and its successors to sell the whole or any part of the estate hereby granted and any property which may be hereafter added thereto as hereinafter provided, either at public or private sale, and to invest and reinvest the proceeds of said sale or any other money which may at any time come into its possession as trustee under this indenture; to change investments from time to time in its discretion; and it shall be lawful for the party of the second part to invest the said proceeds and said moneys in any securities which shall be designated by the party of the first part in writing as well as in such securities as may be permitted by law, and from time to time at the written request of the party of the first part to change any or all of the securities forming the trust estate or any part thereof, and on his written request to extend any investment which may have become due and on his written request to consent to the reorganization or consolidation of any corporation or sale to any other corporation or person of the property of any corporation the stocks, bonds or other securities of which are at the time held by said trustee and to do any act with reference thereto necessary or proper including the payment of moneys to enable said trustee to obtain the benefit of any such reorganization, consolidation or sale of such stocks, bonds or other securities held by said trustee, and to exercise any option for conversion or additional subscriptions extended by any such corporation or in respect to any such stocks, bonds or other securities and to make such conversions and subscriptions

and to make any necessary payments therefor and to hold such new securities in said trusts, and during the lifetime of the party of the first part the trustee may retain any investment until it receives a written notice from the party of the first part to sell or dispose of the same, and the written direction of the party of the first part in respect to any investments or reinvestments or in respect to the conversion, subscription or purchase of any securities forming part of the trust estate shall be full authority and protection to the party of the second part for acting in the faith thereof; and after the death of the party of the first part the party of the second part shall have power to continue to hold any investments in which at the time of his death the trust estate or any part thereof may be invested and shall have power to do all of the things which it is hereby authorized to do on the written request or consent of the party of the first part, except that any reinvestments made after his death shall be made in such property and securities as may be permitted by law for trustees to invest in; and the said party of the second part shall be under no liability whatsoever for any [fol. 86] loss which may arise from the exercise by said party of the second part of any of the powers herein contained; and the proceeds of any sale and the securities and funds acquired or created by any such investments or reinvestments, conversion, subscription or purchase shall be held by the said trustee and its successors In Trust in the same manner and in all respects and to the same extent as it holds the original trust property under this indenture, and the same shall be subject to all the trust limitations and contingencies as is hereinbefore mentioned, expressed and declared of and concerning the original trust property so sold or invested.

By this supplemental indenture it is not proposed to modify, alter or revoke any other trust or trusts or provisions created by or contained in said indenture of December 24, 1913, as modified by said Supplemental Indenture of February 15th, 1916, other than the ones affected by the modification contained in this instrument, and any and all the various provisions and conditions of the said trusts as so modified are hereby in all respects reaffirmed and ratified, specifically including the right of the party of the first part by a further suitable instrument to terminate or modify any or all of the trusts originally created or modified by said Supplemental Indenture of February 15th, 1916, or hereby



modified in the same manner as is described in the indenture dated December 24, 1913.

In Witness Whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be affixed and these presents to be signed by its President, the day and year first above written.

C. H. Sanford, (Seal). Guaranty Trust Company of New York, by Wm. C. Cox, Vice-President.

Attest: L. S. Critchell, Asst. Secretary.  
(Seal)

[fol. 87] STATE OF NEW JERSEY,  
County of Monmouth, ss:

On the 6th day of September, in the year One thousand nine hundred and sixteen, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Carl McDermott, a Commissioner of Deeds in New Jersey for the State of New York.  
(Seal)

STATE OF NEW YORK,  
County of New York, ss:

On this 7th day of August in the year of One thousand nine hundred and sixteen, before me personally came Wm. C. Cox, to me known, who, being by me duly sworn, did depose and say, that he resides in Sag Harbor, New York, and is the Vice-President of Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

A. E. Burke, Notary Public New York County. New York County Clerk's No. 268. New York Register's No. 8011. My Commission Expires Mar. 30, 1918.

(Seal)

[fol. 88] This Supplemental Indenture made the 17th day of August, in the year One thousand nine hundred and seventeen, between Charles Henry Sanford, of Freehold, Monmouth County, in the State of New Jersey, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, party of the second part,

Witnesseth:

That, Whereas, by an indenture dated the twenty-fourth day of December, One thousand nine hundred and thirteen, between the parties hereto, the party of the first part did create various trusts in property of which the party of the second part was made Trustee; and,

Whereas, the said trust indenture between the parties hereto, dated December 24, 1913, contained the following provision:

"The party of the first part, however, reserves the right to terminate or modify any or all of the trusts herein created by a suitable instrument in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part;"

and

Whereas, by supplemental indenture dated the fifteenth day of February, 1916, and by supplemental indenture dated the sixth day of September, 1916, the said Charles Henry Sanford has modified in certain respects the said indenture of December 24, 1913; and

Whereas, the said Charles Henry Sanford desires by this instrument further to modify certain of the trusts created by said indenture dated December 24, 1913:

Now, Therefore, pursuant to the power reserved to the party of the first part by the said Indenture of December 24, 1913, the party of the first part by this supplemental indenture does hereby modify the provision contained in said Indenture of December 24, 1913, by which there is given to Grace Harvey, a daughter of Sarah Elizabeth Wyckoff, an annuity of One thousand dollars for the sup-

Georgina Phipps, Herbert Sanford Ward and Rodney Sanford Ward, are as follows:

(a) \$1,000 per annum to Mrs. Mamie Crisp and Louis Crisp, of 32 Oak Lane, Trenton, N. J. (daughter and son-in-law of William A. Sanford) and to the survivor of them, to be used and applied for the benefit of their daughter Jeanette Crisp as long as she lives, and after her death the said annuity shall be paid to said Mamie Crisp and Louis Crisp, or the survivor of them, during their natural lives, without restriction or limitation as to its use or application.

(b) \$1,000 per annum to William A. Sanford of 509 East Broad Street, Westfield, N. J., to be by him used and applied for the benefit of his son Joseph A. Sanford during the life of the latter, and upon the death of said William A. Sanford such annuity shall be paid by the Trustee to said Joseph A. Sanford during his natural life.

(c) \$1,000 per annum to Jacob Horace Sanford, of 509 East Broad Street, Westfield, New Jersey, (son of William A. Sanford) to be paid to him during his natural life.

(d) \$500 per annum to Delia Sanford, of 509 East Broad Street, Westfield, N. J. (daughter of William A. Sanford), to be paid to her during her natural life; this payment to be in addition to the annuity of \$500 heretofore granted to said Delia Sanford under the original indenture of trust dated December 24, 1913.

[fol. 94] (e) \$500 per annum to Margaret Sanford of Bordentown, N. J. (widow of Charles Sanford, son of William A. Sanford), to be paid to her during her natural life.

(f) \$1,000 per annum to Jacob Van Zandt Wyckoff and his wife, Neola Wyckoff, of 1541 Fuller Avenue, Hollywood, California (son and daughter-in-law of Mrs. S. E. Wyckoff) and to the survivor of them, to be used and applied for the benefit of their children during the lives of the latter, and upon their death the said annuity shall be paid to said Jacob Van Zandt Wyckoff and his wife, Neola Wyckoff, or the survivor of them, during their natural lives, without restriction or limitation as to its use or application.

(g) \$1,000 per annum to Charles S. Wyckoff, of 1541 Fuller Avenue, Hollywood, California (son of Mrs. S. E. Wyckoff) to be paid to him during his natural life.

(h) \$1,000 per annum to Mabel Wyckoff, of 1541 Fuller Avenue, Hollywood, California (daughter of Mrs. S. E. Wyckoff), to be paid to her during her natural life.

(i) \$1,000 per annum to Sarah E. Wyckoff, Mabel Wyckoff, and Charles S. Wyckoff, of 1541 Fuller Avenue, Hollywood, California, and to the survivors or survivor of them, to be used and applied in such manner as may be dictated by the judgment of said Sarah E. Wyckoff, Mabel Wyckoff and Charles S. Wyckoff, or the survivors or survivor of them, for the benefit of Frank Wyckoff as long as he lives. Should all three of the above payees predecease said Frank Wyckoff, then such annuity shall be paid to said Frank Wyckoff during his natural life.

(j) \$1,000 per annum to John Henry Wyckoff and his wife, Carrie Estelle Wyckoff, of 714 West 43rd Place, Los Angeles, California (son and daughter-in-law of Mrs. S. E. Wyckoff), and to the survivor of them, to be used and applied for the benefit of their children during the lives of the latter, and after their death the said annuity shall be paid to said John Henry Wyckoff and Carrie Estelle Wyckoff, or the survivor of them, during their natural lives, without restriction or limitation as to its use or application.

(k) \$500 per annum, to be paid quarterly to the Freehold Trust Company of Freehold, New Jersey, for the account of Blanche Wyckoff (daughter of Mrs. S. E. Wyckoff), such quarterly payments to continue during the natural life of Blanche Wyckoff.

[fol. 95] (l) \$500 per annum to Charles S. Miller and Harriet Miller of South Orange, New Jersey, son and daughter-in-law of Annie Miller, and the survivor of them, during their respective lives.

(m) \$1,500 per annum to Dr. James D. Miller of 219 West 81st Street, New York City (son of Annie Miller), to be paid to him during his natural life and upon his death to continue such annuity to his wife, Mona Miller, during her natural life.

(n) \$500 per annum to Mrs. Elizabeth Bates of 18 Hampton Street, Cranford, New Jersey (daughter of Annie Miller), to be paid to her during her natural life.

(o) \$500 per annum to Sarah F. Yard of Milburn Street, Evanstown, Illinois (daughter of Annie Miller), to be paid to her during her natural life.

port of herself and of her two children now living and after death or re-marriage to the said two children in equal shares so that the said provision shall read as follows:

[fol. 89] "To Mrs. Anna Grace Naquin, a daughter of said Sarah Elizabeth Wyckoff, an annuity of (\$1,000) for the support of her children Edward Clinton Harvey and Grace Elizabeth Harvey, or the survivor of them, until the youngest of them reaches the age of twenty-one years and if she dies before such event the said Annuity shall be paid for account of said children and the survivor of them until the youngest shall attain the age of twenty-one years to said Sarah Elizabeth Wyckoff and Mabel Wyckoff jointly or severally."

In all other respects save as modified by this supplemental indenture and the two supplemental indentures hereinbefore referred to the said Indenture of December 24, 1913, is hereby in all respects reaffirmed and ratified especially including the right of the party of the first part by a further suitable instrument to terminate or modify any or all of the trusts originally created or modified by said supplemental indentures hereinbefore referred to or by this supplemental indenture.

In Witness Whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be affixed and these presents to be signed by its President, the day and year first above written.

C. H. Sanford. (Seal.) Guaranty Trust Company of  
New York, by Wm. C. Lane, Vice-President.

Attest: M. J. Dumont, (Seal.) Asst. Secretary.

STATE OF NEW YORK,  
County of New York, ss:

On the sixteenth day of August, in the year One thousand nine hundred and seventeen, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Carl McDermott, (Seal.) Commissioner of Deeds for  
the State of New York in New Jersey.



[fol. 90] STATE OF NEW YORK,  
County of New York, ss:

On this 17th day of August, in the year One thousand nine hundred and seventeen, before me personally came Wm. C. Lane, to me known, who, being by me duly sworn, did depose and say, that he resides in New York City and is the Vice-President of Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

A. E. Burke, Notary Public, New York County. New York County Clerk's No. 268. New York Register's No. 8011. My Commission expires Mar. 30, 1918. (Seal.)

[fol. 91] This Supplemental Indenture made the 19th day of December, 1917, between Charles Henry Sanford, of Freehold, Monmouth County, in the State of New Jersey, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, party of the second part,

Witnesseth

That Whereas, by an indenture dated the 24th day of December, 1913, the party of the first part did create various trusts in property of which the party of the second part was made trustee; and

Whereas, the said trust indenture between the parties hereto dated December 24, 1913, contained the following provision:

"The party of the first part, however, reserves the right to terminate or modify any or all of the trusts herein created by a suitable instrument in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part";

and

Whereas, pursuant to the aforesaid right reserved to the party of the first part, there were executed supplemental

indentures dated respectively February 15, 1916, September 6, 1916, and August 17, 1917, which instruments together with this indenture are hereinafter for convenience described as the supplements to said original Indenture of Trust, and

Whereas, pursuant to the terms of the trust existing under and by virtue of the instruments hereinbefore recited, the trustee, among other things, held subject to the payments of certain annuities and income to life tenants, five separate trusts for the lives respectively of the five grandchildren of the party of the first part, to wit, Sarita Enriqueta Barclay, Frances Georgina Phipps, Charles Sanford Ward, Herbert Sanford Ward and Rodney Sanford Ward (formerly known as Roger Casement Ward); and

Whereas, as provided in said Indenture of Trust and the supplements thereto, each of the aforesaid five separate trusts was to terminate upon the death respectively of each of said grandchildren, and in the event that any of said grandchildren should die without leaving any child or children or descendant surviving him or her, then the principal [fol. 92] of the trust held for the one so dying should be paid over to the party of the first part if he be living, and, if dead, to his legal representatives; and

Whereas, Charles Sanford Ward, one of said grandchildren, was killed in battle in France at the age of twenty-one years, without leaving any child or children or descendant, and the Trustee does hold as principal of the trust created for the life of said Charles Sanford Ward, securities in accordance with the annexed statement designated as Exhibit 1; the same being now the property of the party of the first part hereto; and

Whereas, the trust agreement dated December 24, 1913, contains a provision reading as follows:

"It is further understood and agreed that the party of the first part may, either in his lifetime or by last will and testament, add to the property described in Schedule A, such other property as he may from time to time transfer to the party of the second part for that purpose and that all such property so transferred in his lifetime shall be designated for such purpose by suitable description thereof in said Schedule A or in a supplemental schedule over the signature of the party of the first part and to be annexed

hereto, and shall thereupon become subject to all the trusts, powers and limitations hereinbefore expressed with regard to property described in said Schedule A."

Now, Therefore, the party of the first part does hereby modify the provisions of said indenture of trust dated December 24, 1913, and adds to the property forming the subject thereof all in the particulars and manner hereinafter stated, that is to say:

First. The principal of the said trust held for the benefit of and during the life of Charles Sanford Ward, now deceased, and now belonging to the party of the first part hereto and described in the annexed Exhibit 1, shall be added to and divided equally among the respective trusts created for the lifetime of each of the four remaining grandchildren of the party of the first part, to wit: Sarita Enriqueta Barclay, Frances Georgina Phipps, Herbert Sanford Ward and Rodney Sanford Ward (formerly known as Roger Casement Ward), to be held upon the trusts, terms, conditions, powers and limitations contained in said trust agreement and the supplements thereto, Subject, However, in respect to each of said trusts so increased

[fol. 93] (1) to the payment out of income of an equal proportion of the expenses and commissions of the Trustee;

(2) to the payment out of income of an equal proportion of the annuities provided for in the Indenture of Trust dated December 24, 1913, and the supplements thereto including those additional annuities which are hereinafter set forth;

(3) to the payment in full of a proportionate part of the indebtedness to the party of the second part recited in the Indenture of Trust dated December 24, 1913, and the supplements thereto, with interest on said indebtedness.

The additional annuities hereby created under this supplemental indenture, all of which are to become immediately payable and a prior charge proportionately against the income arising from the four separate trusts above mentioned, except the four specific annuities of twenty-five thousand dollars (\$25,000) each now payable or soon to become payable to Sarita Enriqueta Barclay, Frances

(p) \$2,000 per annum to Robert C. Miller and Frances Miller, of 21 Holly Street, Cranford, New Jersey (son and daughter-in-law of Annie Miller), and to the survivor of them, to be used and applied for the benefit of their children, during the lives of the latter, and after their death the said annuity shall be paid to said Robert C. Miller and Frances Miller, or the survivor of them, during their natural lives, without restriction or limitation as to its use or application.

(q) \$1,000 per annum to Daniel E. Sanford, of Trenton, N. J. (son of Tylee Sanford), to be paid to him during his natural life.

(r) \$1,000 per annum to Garret T. Sanford and Emma Sanford, of Lakewood, New Jersey (son and daughter-in-law of Tylee Sanford), and to the survivor of them, during their natural lives.

(s) \$1,000 per annum, to be paid to Margaret Irene Sanford, of 505 Summerfield Avenue, Asbury Park, N. J. (daughter-in-law of Tylee Sanford), to be by her used and applied for the benefit of herself and family as she may see fit, during her natural life and upon her death to continue the payment of such annuity to her husband, Frank A. Sanford, during his natural life.

(t) \$1,000 per annum to Henry P. Sanford and Viola Sanford, of 1405 Bangs Avenue, Asbury Park, N. J. (son and daughter-in-law of Tylee Sanford), and to the survivor of them, during their natural lives.

[fol. 96] (u) \$1,000 per annum to Lizzie Henderson Sanford, of 505 Summerfield Avenue, Asbury Park, N. J. (daughter-in-law of Tylee Sanford), to be paid to her during her natural life for the benefit of herself and family as she sees fit, and upon her death to continue the payment of such annuity to her husband, Addison S. Sanford, during his natural life.

(v) \$1,000 per annum to Ollie Cross, wife of Milton Cross, of 505 Summerfield Avenue, Asbury Park, N. J. (daughter of Tylee Sanford), to be paid to her during her natural life.

(w) \$1,000 per annum to Elizabeth Adams, wife of Eleigh Adams, of 505 Summerfield Avenue, Asbury Park, N. J. (daughter of Tylee Sanford), to pay the same to her during her natural life.



(x) \$500 to Mrs. Elizabeth Sanford, widow of Tylee Sanford, of 505 Summerfield Avenue, Asbury Park, N. J., to pay the same to her during her natural life.

(y) \$1,000 per annum to Frederick Joseph Sanford, and to his wife, jointly, and to the survivor of them, for the purpose of aiding in the support of the mother, sister and brothers of said Frederick J. Sanford; this annuity, however, except as elsewhere herein stated, to terminate only upon the death of the survivor of the said Frederick J. Sanford and his wife, this payment to be in addition to the annuity of \$2,000 heretofore granted to said Frederick J. Sanford and his wife under the original indenture of trust dated December 24, 1913.

(z) \$1,000 per annum to Miss Louise Tilton, care of Rev. Dr. Edgar Tilton, 269 Lenox Avenue, New York, to be paid during her natural life.

(aa) \$500 per annum to be paid quarterly to the Freehold Trust Company of Freehold, N. J., for the account of James Billett, valet to the party of the first part, such quarterly payments to continue during the natural life of said James Billett subject to termination should the said James Billett leave the service of the party of the first part in the life-time of the latter.

With respect to each and every annuity hereinbefore recited to be paid for the benefit of any person other than the person to whom the same shall be payable, the Trustee shall [fol. 97] be under no duty whatsoever to see to the application thereof by any person to whom such annuity is directed to be paid hereby, and the receipt of the latter shall be full and ample protection to the Trustee for all purposes hereunder.

In adding to the principal of the four trusts, the property described in said Exhibit 1, the party of the first part does hereby acknowledge full satisfaction and discharge of its duties by the Trustee with respect to the trust originally created for the benefit of Charles Sanford Ward, now deceased, and as the person entitled to receive the same in the event of the death of Charles Sanford Ward, without issue, the party of the first part does direct that the same be added to and divided among the four other trust estates as hereinbefore recited, and does hereby hold harmless the Guaranty



Trust Company of New York of and from any liability arising either from its administration of said trust for the benefit of Charles Sanford Ward or from its act in transferring the principal thereof to the four other trust estates as hereinbefore directed.

Second. The party of the first part does hereby transfer, assign and deliver to the party of the second part as Trustee the property described in the supplemental schedule Exhibit 2 annexed hereto, to be divided into four equal parts and held in trust as hereinafter stated, but subject to the payment of a certain indebtedness due to the party of the second part, such indebtedness having been incurred in the purchase or acquisition of \$250,000 par value Anglo-French Five Year Five Per Cent External Loan Bonds, and \$250,000 par value New York City Four and One-half Per Cent Corporate Stock; the aggregate of said indebtedness being \$466,019.73, with interest thereon from the 19th day of December, 1917, secured by the pledge of the bonds aforesaid. The securities described in said schedule Exhibit 2 annexed hereto shall be added to and divided equally among the respective trusts created by said Indenture of Trust dated December 24, 1913, for the lives respectively of the four remaining grandchildren of the party of the first part, to wit, Sarita Enriqueta Barclay, Frances Georgina Phipps, Herbert Sanford Ward, and Rodney Sanford Ward, to be held upon the trusts, terms, conditions, powers and limitations expressed in said original indenture of trust dated December 24, 1913, and the supplements thereto, subject, however, to the payment out of the income of said property so added to each of said four trusts of a proportionate share of the aforesaid indebtedness last above referred to due to the party of the second part.

[fol. 98] Third. The annuity granted in the original indenture of trust dated December 24, 1913, to Emily Austin Sanford, wife of Charles Henry Sanford, party of the first part hereto, being an annuity of \$50,000 but not to commence until after the indebtedness to the party of the second part, as referred to in the said original indenture of trust, is paid, shall be further postponed until the liquidation and payment in full of the indebtedness incurred in the purchase or acquisition of securities added to the trust estate at the time

of the execution of this supplemental indenture, except that in the event of the decease of the party of the first part prior to the liquidation of the entire indebtedness aforesaid the said annuity payable to Emily Austin Sanford shall become immediately due and payable prior to each and every annuity or payment under the terms of the trusts referred to in said original indenture of trust and the supplements thereto, anything in said original indenture of trust or any supplement thereto to the contrary notwithstanding.

Fourth. In order to resolve any doubts as to the intention of the party of the first part with respect to the operation of the annuity payments in the original indenture of trust and the supplements thereto, it is hereby declared that none of the annuities in said original indenture of trust or supplements thereto shall be diminished or proportionately reduced on account of the falling in of any remainder or remainders provided in said trust indenture, or the supplements thereto, and should any one or more of said trust estates from the income of which the annuities are proportionately payable, be terminated, it is hereby intended that the trusts remaining in existence shall each proportionately bear the increased charge thereon necessary to permit the full payment of each and every annuity created under the original trust or any supplement thereto, as long as any of such trust estates continue.

In Witness Whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be affixed and these presents to be signed by its Vice-President, the day and year first above written.

C. H. Sanford, (L. S.) Guaranty Trust Company of  
New York, by Frederick J. H. Sutton, Vice-President. (Seal.)

Attest: M. J. Dumont, Asst. Secretary.

[fol. 99] STATE OF NEW YORK,  
County of New York, ss:

On the 19th day of December, One thousand nine hundred and seventeen, before me personally came Charles Henry Sanford, to me known and known to me to be the individual

described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

J. A. Powers, Notary Public. Westchester County.  
Certificate filed in New York County. County  
Clerk's No. 139. Register's No. 9124. My Com-  
mission Expires March 30, 1919. (Seal.)

STATE OF NEW YORK,

County of New York, ss:

On this 19th day of December, in the year One thousand nine hundred and seventeen, before me personally came F. J. H. Sutton, to me known, who being by me duly sworn did depose and say that he resides in the City, County and State of New York and is a Vice-President of the Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

J. A. Powers, Notary Public. Westchester County.  
Certificate filed in New York County. County  
Clerk's No. 139. Register's No. 9124. My Com-  
mission Expires March 30, 1919. (Seal.)

[fol. 100]

EXHIBIT "1"

Par Value

£11,000 Anglo-Argentine Tramways Co., Ltd. 4% Debenture Stock (par value £5)  
988 Underground Electric Railway Co. of London, Ltd. 4½% Bonds due 1933  
2,000 Anglo-Argentine Tramways Co., Ltd 5% Debenture Stock  
2,000 Brazil Northeastern Ry. Co., Ltd. 1st Debenture Stock  
1,000 New York Telephone Co. 1st General 4½% Bonds due 1939  
1,000 Chaplin, Milne, Grenfell & Co. Preferred Stock  
1,000 Oriental Republic of Uruguay Consolidated Debenture 3½% Bonds  
2,000 Argentine Republic 4% Loan of 1900 due 1961  
16,000 City of Monte Video Municipal Loan of 1889 due June 1, 1919, interest at 5%  
94,000 Central Argentine Ry., Ltd. Consolidated Ordinary Stock

- \$38,000 Mississippi River & Bonne Terre Ry. Co. 1st Mtge. 5% Bonds due 1931
- 50,000 Central States Electric Corp. 5% Gold Notes due 1922
- 20,000 Chicago, Milwaukee & St. Paul Ry. Co. 4% Gold Bonds due 1934
- 50,000 Great Falls Power Co. 1st Mtge. 5% Bonds due 1940
- 50,000 Lake Shore Electric Ry. Co. General 5% Bonds due 1933
- 10,000 Lake Shore & Michigan Southern Ry. Co. 4% Bonds due 1931
- 10,000 New York Central & Hudson River R. R. Co. 4% Debenture Bonds due 1942
- 50,000 St. Louis & Southwestern Ry. Co. 1st Terminal & Unifying 5% Bonds due 1952
- 60,000 Southern Ry. Co. Development & General 4% Bonds Series "A" due 1956
- 10,000 New York Central Lines Equipment Trust 4½% due 1920
- 25,000 Central Arkansas & Eastern R. R. Co. 1st 5% Gold Bonds due 1940

[fol. 101]

- 20,000 Stephenville North & South Texas Ry. Co. 1st 5% Bonds due 1940
  - 50,000 Baltimore & Ohio R. R. Co. Toledo, Cincinnati Division 1st & Refunding 4% Bonds Series "A" due 1959
  - 145,100 Anglo-French 5-year 5% External Loan due Oct. 15, 1920
  - 1,000 Freehold Trust Co. Capital Stock (10 shares)
  - 9,000 Guaranty Trust Company of New York Capital Stock (90 shares)
  - 2,000 J. G. White & Co., Inc. Preferred Stock (20 shares)
- C. H. Sanford.

[fol. 102]

## EXHIBIT "2"

## Par Value

- \$250,000 Anglo-French 5 Year External Loan 5% Bonds due Oct. 15, 1920
- 250,000 City of New York Corporate Stock 4½% due July 1, 1967
- C. H. S. 1,600 shares Samuel B. Hale Cia. Lda., Capital Stock (par value 1,000 Pesos each)

beneficiaries without deduction for the purpose of liquidating any indebtedness whatsoever.

Very truly yours, C. H. Sanford.

Ctf. 343

Ctf. 352 388 486 532

571 575/7-006/7

Ctf. 625 641 648 686 807 @ 100 ea. name of L. Bowvler end.

@ 100 name of L. Bowvler Trustee endorsed.

@ 100 name of L. Bowvler Trustee endorsed.

[fol. 112] This Supplemental Indenture made this 23rd day of May in the year one thousand nine hundred and nineteen, between Charles Henry Sanford of Freehold, Monmouth County, State of New Jersey, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, party of the second part.

### Witnesseth

that Whereas by an Indenture dated December 24th, 1913, the party of the first part did create various trusts in property in which the party of the second part was made Trustee; and,

Whereas, the said Trust Indenture between the parties hereto dated December 24th, 1913, contained the following provisions:

The party of the first part however, reserves the right to terminate or modify any or all of the trusts created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part,"

and,

Whereas, pursuant to the aforesaid right reserved to the party of the first part, there were executed supplemental indentures dated respectively February 15, 1916, September 6, 1916, August 17, 1917, December 9, 1917, June 28, 1918, and August 16, 1918, which instruments, together with this indenture are hereinafter for convenience described as supplements to the original indenture of trust; and,

Whereas, the party of the first part desires to add to the existing trust estates—



1. \$600,000 United States of America Second Converted Liberty Loan  $4\frac{1}{4}\%$  Bonds due 1942, (subject to collateral pledge to secure the payment of \$570,000);

2. \$1,000,000 United States of America Fourth Liberty Loan  $4\frac{1}{4}\%$  Bonds due 1938 (subject to collateral pledge to secure the payment of \$980,000);

3. All the right, title and interest of the party of the first part in and to the net proceeds of the sale of certain property in South America, title to which stands in the name of S. B. Hale & Co.; all said additions to be made to the existing trust estates are to be made subject to conditions as hereinafter set forth;

Now, Therefore, pursuant to the power reserved to the party of the first part in said Indenture of Trust of December 24, 1913, and the supplements thereto, the party of the first part does hereby modify the same as follows:

First. For the purpose of adding to and increasing the total corpus of the existing trust estates, the party of the first part does hereby assign, transfer and deliver unto the party of the second part, in trust nevertheless for each and every purpose described in the original indenture of trust and the supplements thereto—

1. \$600,000 United States of America Second Converted Liberty Loan  $4\frac{1}{4}\%$  Bonds due 1942, now subject to collateral pledge with the Guaranty Trust Company of New York to secure the payment of the note of the party of the first part for \$570,000, payable August 14, 1919, with interest at 5 per cent;

2. \$1,000,000 United States of America Fourth Liberty Loan  $4\frac{1}{4}\%$  Bonds due 1938, now subject to collateral pledge with Guaranty Trust Company of New York to secure the payment of the collateral note of the party of the first part for \$980,000, payable July 25, 1919, with interest @  $4\frac{1}{4}\%$ ;

3. All right, title and interest of the party of the first part in and to the net proceeds up to \$500,000, collected by S. B. Hale & Co. and to be hereafter collected by S. B. Hale & Co. from and on account of property held by S. B. Hale & Co. acting as agent for the party of the first part in and to the property in the Argentine Republic known as the "Sierra de la Ventana."

Subject, Nevertheless, as to each of the three items of property herein assigned, transferred and delivered upon the express condition that they shall become chargeable with the debt of the party of the first part incurred to acquire the aforesaid \$1,600,000 of United States of America Liberty Bonds as evidenced by the collateral notes hereinbefore described.

Second. The trust estate shall expressly assume the indebtedness of the party of the first part upon the said notes aggregating \$1,550,000, in so far as the property received [fol. 114] and to be received pursuant to this supplemental indenture will be sufficient to satisfy the same, the Trustee expressly repudiating any affirmative obligation to pay the same except out of the proceeds of property acquired pursuant to this supplemental indenture, unless the Trustee shall deem it advisable to acquire the aforesaid \$1,600,000 Liberty Bonds, or any part thereof, free of all lien, by means of the proceeds of investments paid or from the sale or disposition of other securities belonging to the trust estate.

Third. In the event that the Trustee shall not deem it advisable to acquire the absolute title to said bonds free of the liens hereinbefore described, the Guaranty Trust Company of New York, in its capacity as holder of the said collateral notes of the party of the first part, and notwithstanding that it is the Trustee named herein and in said trusts, shall have full right and authority to sell the aforesaid bonds at public or private sale pursuant to its contractual rights as pledgee thereof under collateral note agreements, and to collect from the party of the first part any deficiency on the said notes resulting therefrom, the obligation of the party of the first part being continued for this express purpose, without reservation as to right to notice or days of grace.

Fourth. The party of the first part, for the purpose of securing to the trust estate the benefit of the assignment of the net proceeds of property realized upon by S. B. Hale & Co., as conveyed hereby, undertakes to secure and file with the Trustee an acceptance by S. B. Hale & Co. of the said assignment, the Trustee shall be under no obligation to bring suit or process of any kind against said S. B. Hale & Co. to collect any sums which may become payable under said assignment, or to account for any net

proceeds from the said property known as "Sierra de la Ventana," the party of the first part expressly reserving unto himself, his heirs and assigns all rights of accounting against S. B. Hale & Co. on account of the property in question.

The party of the first part may make advances to the Trustee in anticipation of any such net proceeds to be received from S. B. Hale & Co. and all such advances shall be deducted from the total amount of \$500,000 assigned hereby.

In all respects, except as modified by this supplemental indenture and the supplemental indentures hereinbefore referred to, the said indenture of December 24th, 1913, is hereby re-affirmed, the right to terminate or modify further being expressly reserved hereby.

[fol. 115] In Witness Whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by its Vice-President, the day and year first above written.

C. H. Sanford, (Seal). Guaranty Trust Company  
of New York, By Jas. L. O'Neill, Vice-President.

Attest: H. A. Duncan, Assistant Secretary.

(Seal)

STATE OF NEW YORK,

County of New York, ss:

On this 24th day of May, 1919, personally appeared before me Charles Henry Sanford, to me known and known to me to be the person described in and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

A. E. Burke, Notary Public, New York County. New York County Clerk's No. 356. New York Register's No. 10024. My Commission Expires Mar. 30, 1920.

(Seal)

[fol. 116] STATE OF NEW YORK,

County of New York, ss:

On the 24th day of May, in the year 1919, before me personally came Jas. L. O'Neill, to me known, who, being

referred to, the said Indenture of December 24, 1913, is hereby reaffirmed. The right to terminate or modify further being expressly reserved.

In Witness Whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be affixed and these presents to be signed by its President, the day and year first above written.

C. H. Sanford, (L. S.). Guaranty Trust Company of New York, by Jas. L. O'Neill, Vice-President.

Attest: H. R. Johnston, Assistant Secretary.

(Seal.)

[fol. 105] STATE OF NEW YORK,  
County of New York, ss:

On this 28th day of June, 1918, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

J. A. Powers, Notary Public, Westchester County.  
Certificate filed in New York County. County Clerk's No. 139. Register's No. 9124. My Commission expires Mar. 30, 1919.

(Seal.)

STATE OF NEW YORK,  
County of New York, ss:

On this 28th day of June, 1918, before me personally came Jas. L. O'Neill, to me known, who, being by me duly sworn, did depose and say that he resides in Newark, N. J., and is one of the Vice-Presidents of Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

J. A. Powers, Notary Public. Notary Public, Westchester County. Certificate filed in New York County. County Clerk's No. 139. Register's No. 9124. My Commission expires Mar. 30, 1919.

(Seal.)

[fol. 106] This Supplemental Indenture made this 16th day of August, in the year One thousand nine hundred and eighteen, Between, Charles Henry Sanford of Freehold, Monmouth County, State of New Jersey, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, party of the second part.

Witnesseth,

That Whereas by an Indenture dated December 24th, 1913, the party of the first part did create various trusts in property in which the party of the second part was made trustee and

Whereas the said Trust Indenture between the parties hereto dated December 24th, 1913, contained the following provisions:

"The party of the first part however reserves the right to terminate or modify any or all of the trusts created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part,"

and

Whereas, pursuant to the aforesaid right reserved to the party of the first part, there were executed supplemental indentures dated respectively February 15, 1916, September 6, 1916, August 17, 1917, December 9, 1917, and June 28, 1918, which instruments, together with this indenture are hereinafter for convenience described as supplements to the original indenture of trust, and

Whereas, pursuant to the provisions of the original indenture of trust dated December 24th, 1913, and the supplements thereto, there have been set up trusts in equal shares for the grandchildren of Charles Henry Sanford respectively known and described as Sarita Enriqueta Barclay, Georgina Frances Phipps, Herbert Sanford Ward and Rodney Sanford Ward, and the income from the trusts set apart for Herbert Sanford Ward and Rodney Sanford Ward, after payment of the share thereof on account of certain indebtedness, annuities, expenses and commissions of the



trustee, was payable as to Herbert Sanford Ward and Rodney Sanford Ward as follows:

"The sum of Two thousand five hundred dollars (\$2,500.) annually to the use of each of said minors by paying each of said sums during the minority of said grandchildren [fol. 107] respectively to Sarita Sanford Ward, daughter of the said Charles Henry Sanford, and to Herbert Fitz Edwin Ward, her husband, jointly and to the survivor of them for the support, maintenance and education of said minors, and if any of the said grandsons of Charles Henry Sanford shall attain the age of twenty-one years before said indebtedness shall be paid in full, then after applying out of the said income of such grandson's share after he shall attain twenty-one years of age to his use the sum of Two thousand five hundred dollars (\$2,500.) per annum until said indebtedness shall be paid in full; and after the aforesaid indebtedness is paid, in case any grandson before that time shall have attained the age of twenty-one years, but not the age of twenty-five years, then to apply the net income of the share of such grandson after reserving his proper proportion of said annuities and of the expenses and commissions of the Trustee to the use of said Sarita Sanford Ward and Herbert Fitz Edwin Ward jointly and to the survivor of them until said grandson shall attain the age of twenty-five years and thereafter to apply to the use of such grandson the whole of the aforesaid net income of his share, and to continue to apply the sum of Two thousand five hundred dollars. (\$2,500) annually as aforesaid to the use of each of said grandsons who shall be minors when said indebtedness is paid in full as aforesaid during their respective minorities and to accumulate during his minority the residue of each such minors' share of income after making the proper reductions for the payment of said annuities and trustee's expenses and commissions and as each such minor shall attain the age of twenty-one years, to pay over to him all of said accumulated income of the share of said trust property set apart or designated to him, and as each grandson shall attain twenty-one years of age thereafter, to apply to the use of the said Sarita Sanford Ward and Herbert Fitz Edwin Ward jointly and to the survivor of them all of the net income of his share of said property after reserving the proper proportion of said annuities and trustee's expenses and commissions until he

shall attain the age of twenty-five years and thereafter to apply to his use, after reserving the proper proportion of said annuities and trustee's expenses and commissions all of the income of his share."

and

Whereas the indebtedness referred to in the original Trust Indenture has been liquidated, and the said Charles [fol. 108] Henry Sanford desires that his grandsons Herbert Sanford Ward and Rodney Sanford Ward shall at this time receive the benefit of the income payable to said grandsons and that the provisions heretofore made for the accumulation of such income during their respective minorities shall cease to the end that the Trustee shall pay to the parent or parents of said grandsons the income which has and which hereafter will accrue during the minority of said grandchildren in the same manner as is in the original Indenture of Trust provided with respect to such income as may accrue for their account between the dates when they attain their respective majorities and the time when they shall attain the age of twenty-five years respectively.

Now Therefore pursuant to the power reserved to the party of the first part by said Indenture of Trust of December 24, 1913, the party of the first part by this supplemental indenture does hereby modify the provisions contained in said indenture of December 24, 1913, as amended by the supplements thereto in so far as they direct an accumulation of income during the minorities of said Herbert Sanford Ward and Rodney Sanford Ward to the end that the direction as to the payment of the income of their respective shares shall read as follows:

"and the income of the share of each of said grandsons of said Charles Henry Sanford, to wit, Herbert Sanford Ward and Rodney Sanford Ward, both of whom are now minors, after reserving his proper share of said annuities and of the expenses and commissions of the trustee, to the use of each of said minors by paying the same during their minorities and until such time as they shall have attained the age of twenty-five years respectively, to Sarita Sanford Ward daughter of said Charles Henry Sanford and Herbert Fitz-Edwin Ward, her husband, jointly and to the survivor of them for the support, maintenance and education of the

said grandsons until each grandson shall attain the age of twenty-five years and thereafter to pay to such grandson, after reserving the proper proportion of said annuities for trustee's expenses and commissions, all of the net income from his share."

In all respects save as modified by this supplemental indenture and the supplements hereinbefore referred to, the said Indenture of December 24th, 1913, is hereby reaffirmed, the right to terminate or modify further being expressly reserved hereby.

[fol. 109] In Witness Whereof, the party of the first part has hereunto set his hand and seal and the party of the second part has caused these presents to be signed by its President the day and the year first above written.

C. H. Sanford, Guaranty Trust Company of New York, by F. J. H. Sutton, Vice President.

(Seal.)

Attest: H. R. Johnston, Assistant Secretary.

STATE OF NEW YORK,

County of New York, ss:

On the 16th day of August, 1918, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

A. E. Burke, Notary Public, New York County. New York County Clerk's No. 356. New York Register's No. 10024. My Commission Expires Mar. 30, 1920.

[fol. 110] STATE OF NEW YORK,

County of New York, ss:

On the 16th day of August in the year 1918, before me personally came

to me known, who, being by me duly sworn, did depose and say that he resided in New York, N. Y.; that he is the Vice President of Guaranty Trust Company of New York, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal;

that he was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

A. E. Burke, Notary Public, New York County. New York County Clerk's No. 356. New York Register's No. 10024. My Commission Expires Mar. 30, 1920.

[fol. 111]

October 10, 1918.

GUARANTY TRUST COMPANY OF NEW YORK,  
140 Broadway, New York City.

Gentlemen:

You are Trustee under Trust Indenture dated December 24, 1913, to which agreement certain agreements supplemental thereto have been executed on various dates, to wit:

February	15, 1916
September	6, 1916
August	17, 1917
December	19, 1917
June	28, 1918
August	16, 1918

In the Supplemental Indenture dated December 19, 1917 certain securities were added to the Trust Estate, but such addition was made subject to the payment, out of the income of the property added, of certain indebtedness then amounting to \$466,019.73 with interest thereon from December 19, 1917, which indebtedness had been incurred in purchase or acquisition of certain of the securities then transferred to the Trustee.

The Supplemental Indenture of December 19, 1917 also provided that the payment of a certain annuity of \$50,000, payable to my wife, Emily Austin Sanford, was to be postponed until the liquidation and payment in full of the indebtedness before referred to.

I have this day added to the property held in trust by you, the sum of \$409,108.73, which addition has been made expressly upon the condition that the same be used to liquidate and pay in full the remaining indebtedness chargeable against property held by you as Trustee, to the end that the Trust Estate be free of all debt and the income therefrom shall become immediately due and payable to the various

by me duly sworn, did depose and say that he resides in Newark, N. J., that he is a Vice-President of Guaranty Trust Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

J. A. Powers, Notary Public, Westchester County.  
 Certificate filed in New York County. County  
 Clerk's No. 17. Register's No. 1159. My Com-  
 mission Expires Mar. 30, 1921.

(Seal)

[fol. 117]

Original

[Charles H. Sanford to Guaranty Trust Company of New  
 York]

(May 23, 1919)

GUARANTY TRUST COMPANY OF NEW YORK;  
 140 Broadway, New York City.

Gentlemen:

This day I have executed a supplemental Indenture of Trust to modify the Trust Indenture executed by myself and yourselves December 24, 1913, and prior Supplemental Indentures with respect to the same.

This letter is intended to serve as an explanation of the transaction.

The Supplemental Indenture of Trust transfers among other things certain United States Liberty Bonds to yourselves as Trustee, said Bonds being pledged as security for my collateral notes in an amount less than the face of said Liberty Bonds.

I take this step because I contemplate going to Europe and I wish to provide automatically for the re-investment of certain securities belonging to the trust estate when said securities become due and payable, also to automatically arrange for the investment of the net proceeds of certain property in Argentine Republic known as "Sierra de la Ventana," which net proceeds are also assigned by the supplemental indenture of trust.



These Liberty Bonds were subscribed for by me as a matter of patriotism pursuant to banking arrangements made at the time of public subscription therefor. By the supplemental indenture it is intended that the principal net addition to the trust estate will be the amount to be received from S. B. Hale & Co. as the net proceeds of realization from the property "Sierra de la Ventana."

In this transaction I realize that your institution, as holder of my collateral notes, representing my indebtedness incurred to acquire the aforesaid Liberty Bonds, must be protected. In view, therefore, of the slight margin between the amount of my indebtedness on account of such purchase of Bonds and the principal amount of the Bonds, [fol. 118] additional cash should be actually received by the trust estate before the Bonds are taken up and discharged from the lien of my collateral notes. The time when money will be received from S. B. Hale & Co. on account of the property in Argentine Republic is unknown.

It is contemplated that among the securities in the trust estate, \$50,000 of Bonds of the New York Central Railroad will become due and payable in January, 1920, and that \$1,000,000 of Anglo-French Bonds will become due and payable in April, 1920. When, pursuant to such maturities, reinvestments are made, it is my desire that an equal principal amount of United States Liberty Bonds shall replace such matured investments, and that to the extent of such replacement they shall be held free from the lien created by my collateral notes. I realize further that there should be a substantial margin of market value in such bonds to enable you as trustee to discharge such bonds or portions thereof from the lien of such collateral notes, and before this time I confidently believe that substantial sums, at least equal to \$35,000, will have been realized from S. B. Hale & Co. In the event that such sum of \$35,000 is not received before the required time, I do hereby undertake to advance to the trust estate such sum of \$35,000 the same to serve as an offset or deduction from the total sum of \$500,000, to be received from S. B. Hale & Co. as the net proceeds from the property known as "Sierra de la Ventana."

Further, it is understood that my obligation upon the notes shall continue and that I will arrange for their renewal by my duly authorized power of attorney to the end that the Guaranty Trust Company of New York as holder

The above items as to New York City Corporate Stock and Anglo-French Bonds are subject to the indebtedness incurred in their purchase and acquisition, with interest thereon from December 19th, 1917.

C. H. Sanford.

[fol. 103] This Supplemental Indenture made the 28th day of June, in the year One thousand nine hundred and eighteen, between Charles Henry Sanford, of Freehold, Monmouth County, State of New Jersey, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, party of the second part,

Witnesseth:

That, Whereas, by an Indenture dated the 24th day of December, 1913, the party of the first part did create various trusts in property in which the party of the second part was made Trustee; and,

Whereas, the aforesaid Indenture contained a provision whereby the party of the first part reserved the right from time to time to add to the corpus of the trust; and,

Whereas, the said Trust Indenture between the parties hereto dated December 24, 1913, contained the following provision:

"The party of the first part, however, reserves the right to terminate or modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part;"

and,

Whereas, pursuant to the aforesaid right reserved to the said party of the first part, there were executed Supplemental Indentures dated respectively February 15, 1916, September 6, 1916, August 17, 1917, and December 19, 1917, which instruments together with this Indenture are hereinafter, for convenience, described as supplements to the original Indenture of Trust, the party of the first part desires to terminate or modify the trusts existing pursuant

to the instruments above mentioned, in the following particulars, to wit:

1. To modify that provision of the Supplemental Indenture dated August 17th, 1917, which creates an annuity to Mrs. Anna Grace Naquin, a daughter of Sara Elizabeth Wyckoff.

2. To add to the existing trust estates the sum of \$2,353.06 in cash upon and subject to conditions.

[fol. 104] Now, therefore, the party of the first part does hereby terminate or modify the trusts created by said instruments as follows:

First. The party of the first part does hereby modify the provision of the Supplemental Indenture dated August 17th, 1917, describing, and limiting the annuity payable to Mrs. Anna Grace Naquin, a daughter of Sara Elizabeth Wyckoff, so that the same shall now read as follows:

"To Mrs. Anna Grace Naquin, a daughter of Sara Elizabeth Wyckoff, an annuity of one thousand dollars (\$1,000) during her lifetime, and should she die before the younger of her two children Edward Clinton Harvey and Grace Elizabeth Harvey shall have attained the age of twenty-one years, the said annuity shall be continued for the benefit of said minor children or the survivor of them during their respective minorities, by paying the amount thereof to Sarah Elizabeth Wyckoff and Mabel Wyckoff, jointly and severally, for the support of said minors."

Second. The party of the first part does hereby add to and increase the total corpus of the existing trust estates the sum of \$2,353.06 in cash conditional upon and subject to the immediate application by the Trustee of the said sum to the complete liquidation and final discharge of the entire balance due to the party of the second part for or on account of the indebtedness due the party of the second part at the time of the original Indenture dated December 24, 1913, and referred to therein to the end that the only remaining charge as to which any income may be subject hereafter shall be the indebtedness assumed at the time of the additions and increase to the trust estates pursuant to the Supplemental Indenture dated December 19, 1917.

In all respects, save as modified by this Supplemental Indenture and the Supplemental Indentures hereinbefore

her benefit during her minority and thereafter to be paid directly to said Eunice Stokes Cocks during her natural life. During the minority of said Eunice Stokes Cocks a receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the Trustee with respect to such payments.

In all other respects except as modified by this Supplemental Indenture and the Supplemental Indentures herein [fol. 129] before referred to the said Indenture of September 24, 1913 is hereby reaffirmed and ratified especially including the right of the party of the first part to modify any or all of the trusts originally created or modified by said Supplemental Indentures aforesaid.

In Witness Whereof the party of the first part has hereunto set his hand and seal and the party of the second part has caused its corporate seal to be affixed and these presents to be signed by its Vice-President the day and year first above written.

C. H. Sanford, Guaranty Trust Company of New York, by Frederick J. H. Sutton, Vice-President.

Attest: H. D. Quinby, Assistant Secretary.  
(Seal.)

STATE OF NEW YORK,  
County of New York, ss:

On this 25th day of November 1921 before me personally came Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Richard H. Parks, Notary Public, Queens County No. 413. Certificate filed in New York County No. 164. New York County Register's No. 2139. Certificate filed in Kings County No. 67. Kings County Register's No. 2059. Commission Expires March 30, 1922.

(Seal.)

[fol. 130] STATE OF NEW YORK,  
County of New York, ss:

On this 25th day of November, 1921 before me personally came Frederick J. H. Sutton, who being by me duly sworn

did depose and say: that he resides at 15 East 10th Street, Borough of Manhattan, City of New York, that he is a Vice-President of Guaranty Trust Company of New York the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal and that it was so affixed by order of its Board of Directors and that he signed his name thereto by like order.

(Sgd.) Richard H. Parks, Notary Public, Queens County No. 413. Certificate filed in New York County No. 164. New York County Register's No. 2139. Certificate filed in Kings County No. 67. Kings County Register's No. 2059. Commission Expires March 30, 1922.

(Seal.)

[fol. 131] This Supplemental Indenture made the 20th day of November in the year One thousand nine hundred and twenty-two, between Charles Henry Sanford of Freehold, Monmouth County, State of New Jersey, party of the first part and Guaranty Trust Company of New York, (hereinafter for convenience termed the "Trustee"), a corporation organized and existing under the laws of the State of New York,

Witnesseth, That Whereas by Indenture dated the 24th day of December, 1913, between the parties hereto, the party of the first part did create various trusts in property, of which the party of the second part was made Trustee, and,

Whereas Indentures supplemental thereto have been executed by the said parties respectively dated February 15, 1916, September 6, 1916, August 17, 1917, December 19, 1917, June 28, 1918, August 16, 1918, May 23, 1919, November 26, 1919, March 16, 1920, November 25, 1921, by which Supplemental Indentures (which together with the Indenture of December 24, 1913 are hereinafter for convenience termed the "Trust Indentures") additions to the trusts created by the Indenture of December 24, 1913 have been made by the party of the first part, modifications have been made with respect to such trusts pursuant to the right reserved in the party of the first part by the terms of the Trust Indentures, and,

Whereas pursuant to said Trust Indentures the corpus of one of the trusts thereby created have heretofore become



of said notes shall be fully paid, I being liable for any deficit upon any sale of such Liberty Bonds held as collateral therefor.

Very truly yours, C. H. Sanford.

[fol. 119] SAMUEL B. HALE-COMPANY, LIMITED

Buenos Aires, July 17th, 1913.

GUARANTY TRUST COMPANY OF NEW YORK,  
140 Broadway, New York.

Gentlemen:

We are acting as agents for Charles H. Sanford in the matter of realizing upon certain property in the Argentine Republic known as Sierra de la Ventana, consisting at present of about 9,900 (nine thousand nine hundred) hectares and a fully furnished Hotel with 100 (One hundred) rooms.

Mr. Sanford has directed us to turn over to you, as Trustees under a certain trust indenture dated December 24th, 1913, and supplements thereto, all the net proceeds arising from our transactions of realization upon said property, up to Five hundred thousand dollars (\$500,000.—).

This letter will serve as our acceptance of Mr. Sanford's directions to make such payments to you.

We remain, Dear Sirs,

Yours faithfully, J. Hale Pearson, President.

A. H. Pasmaul, Secretary.

[fol. 120] This Supplemental Indenture made the 26th day of November in the year One thousand nine hundred and nineteen, between Charles Henry Sanford, of Freehold, Monmouth County, State of New Jersey, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, party of the second part,

Witnesseth

That Whereas, by an indenture dated the 24th day of December, 1913, the party of the first part did create various trusts in property in which the party of the second part was made Trustee; and,

Whereas, the said Trust Indenture between the parties hereto dated December 24, 1913, contained the following provision:

"The party of the first part, however, reserves the right to terminate or modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part;"

and,

Whereas, pursuant to the aforesaid right reserved to the said party of the first part, there were executed Supplemental Indentures dated respectively February 15, 1916, September 6, 1916, August 17, 1917, December 19, 1917, June 28, 1918, August 16, 1918, and May 23, 1919; and

Whereas, the party of the first part desires to modify the above-quoted provision;

Now, Therefore, the party of the first part does hereby modify the same so that the said clause shall read as follows:

"The party of the first part, however, reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York, and filed with the party of the second part; but this right of modification, however, [fol. 121] shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument."

In all respects, save as modified by this supplemental indenture and the supplemental indentures hereinbefore referred to, the said Indenture of December 24, 1913, is hereby reaffirmed.

In Witness Whereof, the party of the first part has hereunto set his hand and seal, the day and year first above written, and the party of the second part has caused its corporate

seal to be hereunto affixed and these presents to be signed by its Vice-President, this 15th day of December, 1919.

C. H. Sanford (L. S.). Guaranty Trust Company of New York, by M. P. Callaway, Vice-President.

Attest: E. P. Davis, Assistant Secretary.  
(Seal)

UNITED KINGDOM OF GREAT BRITAIN AND IRELAND,  
City of London, ss:

On this 26th day of November, 1919, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

31997, R. Westacott, Vice Consul of the United States of America at London, England.

(Seal)

American  
Consular Serv.  
Stamp—Cancelled

[fol. 122] STATE OF NEW YORK,  
County of New York, ss:

On this 15th day of November, 1919, before me personally came M. P. Callaway, to me known, who, being by me duly sworn, did depose and say that he resides in New York, N. Y., and is the Vice-President of Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation; and that he signed his name thereto by like order.

J. A. Powers, Notary Public, Westchester County.  
Certificate filed in New York County. County  
Clerk's No. 17. Register's No. 1159. My Commis-  
sion Expires March 30, 1921.

(Seal)

[fol. 123] This Supplemental Indenture made the 16th day of March, 1920, between Charles Henry Sanford of Freehold, Monmouth County, State of New Jersey, party of the

first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, party of the second part, witnesseth that

Whereas, by an indenture dated the 24th day of December, 1913, the party of the first part did create various trusts in property of which the party of second part was made trustee and

Whereas, pursuant to authority contained in said trust indenture dated December 24th, 1913, various supplemental indentures modifying the terms of said indenture were executed, bearing the dates respectively: February 15th, 1916; September 6th, 1916; August 17th, 1917; December 19th, 1917; June 28th, 1918; August 16th, 1918; May 23rd, 1919 and November 26th, 1919, and,

Whereas, pursuant to the last mentioned supplemental indenture bearing date November 26th, 1919 the clause in the original indenture defining the right of modification reserved to the party of the first part, was modified so as to read as follows:

"The party of the first part, however, reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York, and filed with the party of the second part; but this right or modification, however, shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument."

Whereas, a certain annuity payable to Emily A. Sanford was directed in the original indenture of trust to be postponed and not paid to the Beneficiary until certain then existing indebtedness against securities in the trust had been liquidated, and,

Whereas, the indebtedness referred to in the original indenture dated December 24th, 1913, was actually liquidated and subsequent thereto further securities were acquired subject to indebtedness as defined in the supplemental indenture dated December 19th, 1917, and pursuant to which supplemental indenture the payment of said annuity to

I thoroughly understand and approve the transaction and release you from all liability for any action taken by you pursuant thereto.

Very truly yours, Emily A. Sanford.

[fol. 127] This Supplemental Indenture made the 25th day of November, 1921, between Charles Henry Sanford of Freehold, Monmouth County, State of New Jersey, party of the first part and Guaranty Trust Company of New York, a corporation existing under the Laws of the State of New York, party of the second part,

Witnesseth, That Whereas by indenture dated the 24th day of December, 1913, the party of the first part did create various trusts in property, of which the party of the second part was made Trustee, and,

Whereas the said Trust Indenture between the parties hereto dated December 24, 1913, contains the following provision:

"The party of the first part, however, reserves the right to terminate or modify any or all of the trusts herein created by a suitable instrument in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the Laws of the State of New York and filed with the party of the second part."

and,

Whereas pursuant to the aforesaid right reserved to the party of the first part there were executed Supplemental Indentures, dated respectively, February 15, 1916, September 6, 1916, August 17, 1917, December 19, 1917, June 28, 1918, August 16, 1918, May 23, 1919, November 26, 1919, and March 16, 1920, which instruments together with this Indenture are hereinafter for convenience described as supplements to the original Indenture of trust, and,

Whereas by the Supplemental Indenture, dated November 26, 1919, the provision above quoted was modified so as to read as follows:

"The party of the first part, however, reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and



duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part; but this right of modification, however, shall in no way be deemed or construed to include any rights or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument."

and,

Whereas pursuant to the terms of the trust existing under and by virtue of the instruments hereinbefore recited certain annuities are made prior charges against the payment of income to the life tenants under four separate trusts for the lives respectively of the four surviving grandchildren of the party of the first part, to wit: Sarita Enriqueta Barclay; Frances Georgina Phipps; Herbert Sanford Ward and Rodney Sanford Ward, and,

Whereas it is the desire of the party of the first part to modify further the trusts created by constituting two certain annuities as a further prior charge against the income payable out of the trusts aforesaid,

Now, Therefore, the party of the first part does hereby modify the provisions of the said trusts to the extent that said party of the first part does hereby direct that the following additional annuities shall become immediately payable as a charge proportionately against the income arising from the said four trusts prior to the income payable to Sarita Enriqueta Barclay; Frances Georgina Phipps; Herbert Sanford Ward and Rodney Sanford Ward, said additional annuities being directed to be paid as follows:

(a) \$500 per annum to Rev. Frank R. Symmes of Freehold, N. J., payable in one installment annually, commencing January 1, 1922 and on each January 1st thereafter during his life without restriction or limitation as to its use or application.

(b) \$500 per annum to Eunice Stokes Cocks, daughter of Gertrude S. Cocks, now residing at 44 West 10th Street, Borough of Manhattan, City of New York, which sum shall be paid January 1, 1922 and on each January 1st thereafter during the life of said Eunice Stokes Cocks to Gertrude S. Cocks, mother of said Eunice Stokes Cocks, to be applied for

payable to the party of the first part who thereupon conveyed the property constituting the corpus thereof to the remaining trusts, and,

Whereas Rodney Sanford Ward, one of the trust beneficiaries died on the 16th day of September 1922 without leaving any child or children or descendants and the Trustee does hold as part of the trust created for the life of said Rodney Sanford Ward securities in accordance with the annexed statement designated as "Exhibit 1", the same being now payable to the party of the first part hereto, pursuant to the terms of the Trust Indentures who desires likewise to add the property constituting the corpus of such trust to the corpus of certain of the remaining trusts, and,

Whereas the party of the first part desires to make certain further modifications pursuant to the power reserved to him,

[fol. 132] Now, Therefore, and pursuant to the power reserved to the party of the first part by the Trust Indentures, the party of the first part by this Supplemental Indenture does hereby grant, bargain, sell, assign, transfer and set over unto the Trustee and to its successors and assigns the property described upon the list hereto annexed marked "Exhibit 1" and signed by the party of the first part together with all and singular the estate, interest, property claim and demand of the party of the first part thereunto belonging or in anywise appertaining, subject nevertheless to the terms and conditions hereinafter stated.

The party of the first part by his signature to the schedules A. B. C. and D., also hereunto annexed, does identify and hereby confirm his previous conveyance to the Trustee of the property respectively described upon said schedules, of which schedules B. C. and D. contain a distribution of the additional property this day conveyed to the Trustee and described upon Exhibit 1, hereto annexed. Said schedules A. B. C. and D. respectively describe the present corpus and principal of the four trusts respectively created and for convenience therein and hereinafter described as "Colville Herbert Sanford-Barclay Trust," "Sarita E. Barclay Trust," "Frances G. Phipps Trust" and "Herbert Sanford Ward Trust." And the party of the first part does hereby ratify each and every act of the Trustee heretofore taken with respect to the investments in said schedules described,

and with respect to all other acts of the Trustee pursuant to the Trust Indentures.

The terms and conditions upon which the property herein and heretofore granted, bargained, sold, assigned, transferred and set over unto the Trustee are hereby modified so that the same shall now read as follows:

"To Have and to Hold the property described as the 'Colville Herbert Sanford Barclay Trust' upon Schedule A, hereto annexed, to the Trustee and its successors to collect and receive the interest, income and profits thereof and accumulate the said income, interest and profits for the benefit of Colville Herbert Sanford Barclay, a great-grandson of the party of the first part, until the said Colville Herbert Sanford Barclay shall attain the age of twenty-one years and then to pay over to him the property in whatever form it may be at that time invested and all accumulations of said income, and if he shall die before attaining the age of twenty-one years, then upon his death to pay over the said Trust Fund and all accumulations thereof to his eldest brother then living, and if there shall be no brother of his [fol. 133] living at that time, then to pay over and distribute the said principal sum and all accumulated income thereof to and among the nephews and nieces then living of the party of the first part in equal shares and to the descendants of any deceased nephew or niece, *per stirpes* and not *per capita*, the share which would have been taken by such deceased nephew or niece if living, except that the share of Addison Star Sanford, one of said nephews shall be paid to his wife, or if she be dead to her descendants *per stirpes* and not *per capita*.

To Have and to Hold the property described as the 'Sarita E. Barclay Trust', upon Schedule B., hereto annexed, to the Trustee and its successors to collect and receive the interest, income and profits thereof and out of the said income during the natural life of Sarita E. Barclay, to pay the following annuities as hereinafter provided, namely, to

- (1) Emily A. Sanford, (the wife of the party of the first part) an annuity of \$17,000 payable quarterly during her natural life. Until different instructions are received from Emily A. Sanford all payments are to be made to the Freehold Trust Company for deposit to the credit of her account

[fol. 124] Emily A. Sanford was further postponed until the liquidation of the then existing indebtedness against the securities acquired by the trust pursuant to such last mentioned supplemental indenture and

Whereas, the specific indebtedness last above referred to was subsequently liquidated whereupon the annuity payable to said Emily A. Sanford was actually paid as the same accrued and has so been continued to be paid as accrued up to January 1st, 1920.

Now, Therefore the party of the first part does hereby modify the trust created by the indenture of December 24th, 1913, and the various supplemental indentures hereinbefore recited to the end that the annuity payable quarterly thereunder to said Emily A. Sanford shall be further postponed and payment thereof suspended until the first quarter following the date of death of the party of the first part or until further modification with respect to the same pursuant to the power reserved to the party of the first part and that no income under said annuity shall accrue in favor of said Emily A. Sanford until the time of payment hereinbefore directed. In all respects save as modified by this supplemental indenture and the supplemental indentures hereinbefore referred to the said indenture of December 24th, 1913, including the right of modification reserved in the supplemental indenture of November 26th, 1919, is hereby reaffirmed.

In Witness Whereof the party of the first part has set his hand and seal the date above written and the party of the second part has caused its corporate seal to be hereunto affixed and these presents to be signed by its Vice-President this 16th day of March, 1920.

C. H. Sanford (L. S.). Guaranty Trust Company of  
New York, by F. J. H. Sutton, Vice-President.

(Seal)

Attest: C. M. Schmidt, Assistant Secretary.

[fol. 125] UNITED KINGDOM OF GREAT BRITAIN AND IRELAND,  
City of London, England:

On this 25th day of May, 1920, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the fore-

going instrument and he duly acknowledged to me that he executed the same.

No. 6175, R. Westacott, Vice Consul for the United States of America at London, England. (Seal)

American  
Consular Serv.  
Stamp—Cancelled

STATE OF NEW YORK,  
County of New York, ss:

On this 20th day of August, 1920, before me personally came E. J. H. Sutton, to me known, who, being by me duly sworn did depose and say that he resides in the County of New York and is the Vice-President of Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

R. A. Watson, Notary Public. New York County Clerk's No. 389. New York County Register's No. 1477. Bronx County Clerk's No. 41. Bronx County 30, 1921.

(Seal)

[fol. 126]

Dated March 16, 1920.

Guaranty Trust Company of New York, 140 Broadway,  
New York, N. Y.

GENTLEMEN:

Referring to annuity payable to me pursuant to the indenture of trust dated December 24, 1913, executed by Charles H. Sanford and yourself as trustee, and the various indentures supplemental thereto, I have examined the further supplemental indenture executed this day by Charles H. Sanford, the purport whereof is to suspend the payment and accrual of an annuity in my favor until the quarter following the death of Charles H. Sanford or further modification by said Charles H. Sanford with respect to the said annuity.



and the receipt of said Trust Company shall be full acquittance to the Trustee.

(2) Mary Elizabeth Sanford, an annuity of \$1,000 payable quarterly during her natural life.

(3) Delia Sanford, (daughter of Mary Elizabeth Sanford) an annuity of \$300 payable quarterly during her natural life.

(4) Sarah Elizabeth Wyckoff, (a sister of the party of the first part) an annuity of \$1,300 during her natural life.

(5) Anna Grace Naquin, (a daughter of Sarah Elizabeth Wyckoff) an annuity of \$300 payable quarterly during her natural life, and should she die before the younger of her two children Edward Clinton Harvey and Grace Elizabeth Harvey shall have attained the age of twenty-one years, the said annuity shall be continued for the benefit of said minor children or the survivor of them during their minority, the amount thereof to be paid to Sarah Elizabeth Wyckoff and Mabel Wyckoff jointly or severally for the support of said minors.

[fol. 134] (6) Mary Anna Miller, (a sister of the party of the first part) an annuity of \$1,300 payable quarterly during her natural life.

(7) Frederick J. Sanford, (a nephew of the party of the first part) and to his wife jointly, and to the survivor of them, an annuity of \$1,000 payable quarterly, for the purpose of aiding in the support of the mother, sisters and brothers of said Frederick J. Sanford; this annuity to terminate upon the death of the survivor of said Frederick J. Sanford and his wife.

(8) Mamie Crisp and Louis Crisp (daughter and son-in-law of William A. Sanford, a brother of the party of the first part) and to the survivor of them an annuity of \$500 payable quarterly to be used and applied for the benefit of their daughter Jeannette Crisp as long as she lives, and after her death the said annuity shall be paid the said Mamie Crisp and Louis Crisp, or the survivor of them during their natural lives, without restriction or limitations as to its use or application. The receipt of said Mamie Crisp and, or, Louis Crisp for such payments shall be full acquittance and discharge of the Trustee with respect to such payments.

(9) Joseph A. Sanford (a nephew of the party of the first part) an annuity of \$300 payable quarterly during his natural life.

(10) Jacob Horace Sanford (a nephew of the party of the first part) an annuity of \$500 payable quarterly during his natural life.

(11) Margaret Sanford (widow of Charles Sanford, son of William A. Sanford, an annuity of \$150 payable quarterly during her natural life.

(12) Jacob Vanzandt Wyckoff and his wife Neola Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff) and to the survivor of them, an annuity of \$650 payable quarterly during their natural lives.

(13) Charles S. Wyckoff (son of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during his natural life.

(14) Mabel Wyckoff, (daughter of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during her natural life.

[fol. 135] (15) Frank Wyckoff, (son of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during his natural life.

(16) John Henry Wyckoff and his wife Carrie Estelle Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff) an annuity of \$300 payable quarterly and to the survivor of them during their natural lives.

(17) Charles S. Miller and Harriet Miller his wife (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$300 payable quarterly during their respective lives.

(18) Dr. James D. Miller (son of Annie Miller) an annuity of \$650 payable quarterly during his natural life, and upon his death such annuity to be continued to his wife Mona Miller during her natural life.

(19) Elizabeth Bates (daughter of Annie Miller) an annuity of \$400 payable quarterly during her natural life.

(20) Sarah F. Yard (daughter of Annie Miller) an annuity of \$300 payable quarterly during her natural life.

(21) Robert C. Miller and Frances Miller (son and daughter-in-law of Annie Miller) and to the survivor of

them, an annuity of \$1,000 payable quarterly during their natural lives.

(22) Daniel E. Sanford (son of Tylee Sanford) an annuity of \$300 payable quarterly during his natural life.

(23) Garrett T. Sanford and Emma Sanford (son and daughter-in-law of Tylee Sanford) and to the survivor of them, an annuity of \$1,200 payable quarterly during their natural lives.

(24) Margaret Irene Sanford (daughter-in-law of Tylee Sanford) an annuity of \$400 payable quarterly to be by her used and applied for the benefit of herself and family as she may see fit, during her natural life, and upon her death to continue the payments of said annuity to her husband Frank A. Sanford, during his natural life.

[fol. 136] (25) Henry P. Sanford and Viola Sanford (son and daughter-in-law of Tylee Sanford) and the survivor of them, an annuity of \$300 payable quarterly during their natural lives.

(26) Lizzie Henderson Sanford (daughter-in-law of Tylee Sanford) an annuity of \$500 payable quarterly, to be used and applied for the benefit of herself and family as she may see fit during her natural life, and upon her death to continue the payment of said annuity to her children in equal shares during their respective minorities.

(27) Ollie Cross (daughter of Tylee Sanford) wife of Milton Cross an annuity of \$300 payable quarterly during her natural life.

(28) Elizabeth Adams (daughter of Tylee Sanford) wife Eleigh Adams, an annuity of \$300 payable quarterly during her natural life.

(29) Elizabeth Sanford (widow of Tylee Sanford) an annuity of \$400 payable quarterly during her natural life.

(30) Louise Tilton, an annuity of \$500 payable quarterly during her natural life.

(31) James Billett (valet to the party of the first part) an annuity of \$200 payable quarterly during his natural life.

(32) Eunice Stokes Cocks (daughter of Gertrude S. Cocks) an annuity of \$200 per annum, which sum shall be

paid January 1, 1923 and on each January 1st thereafter during the life of said Eunice Stokes Cocks to Gertrude S. Cocks, mother of said Eunice Stokes Cocks, to be applied for her benefit during her minority and thereafter to be paid directly to said Eunice Stokes Cocks during her natural life. During the minority of said Eunice Stokes Cocks—receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the Trustee with respect to such payments.

(33) Rowland E. Cocks, Jr. (son of Gertrude S. Cocks), an annuity of \$150 per annum, which sum shall be paid January 1, 1923 and on each January 1st thereafter during the life of said Rowland E. Cocks, Jr., to Gertrude S. Cocks, [fol. 137] mother of said Rowland E. Cocks, Jr., to be applied for his benefit during his minority and thereafter to be paid directly to said Rowland E. Cocks, Jr., during his natural life. During the minority of said Rowland E. Cocks, Jr., receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the Trustee with respect to such payments.

(34) Reverend Frank R. Symmes and to Elizabeth J. Symmes, his wife, and to the survivor of them of Freehold, N. J., an annuity of \$300 per annum payable quarterly during their natural lives,

(35) Alfred Bird (secretary to the party of the first part) an annuity of \$650 payable quarterly during his natural life, or until such time as the party of the first part, or his wife, Emily A. Sanford shall notify the Trustee that said Alfred Bird is no longer in his or her employ, or is not rendering satisfactory service as such employee.

(36) Muriel Jane Bird (daughter of Alfred Bird) an annuity of \$300 payable quarterly during her natural life. Such annuity, however, is not to commence until the death of said Alfred Bird, nor unless said Alfred Bird was in the employ of the party of the first part, or his wife Emily A. Sanford at the time of said Alfred Bird's death, it being intended that said annuity shall be a continuation in a reduced amount of the annuity formerly payable to her father, Alfred Bird.

And, after payment of said annuities together with the expenses and commissions of the said Trustee to apply the

residue of the net income to the use of Sarita E. Barclay during the time of her natural life. Upon the death of the said Sarita E. Barclay, there shall be excepted and reserved from the corpus of the trust fund theretofore held as the Sarita E. Barclay Trust:

(1) Such sums as in the unrestricted judgment and discretion of the Trustee may be necessary to purchase equivalent annuities for each of the persons then surviving to whom an annuity has been granted and made a prior charge against the income aforesaid, or in lieu thereof such sums, as the Trustee may deem necessary to commute and satisfy such equivalent annuities, full power and discretion being hereby vested in the Trustee to make such settlement or to [fol. 138] effect such arrangement for the satisfaction of such annuities.

(2) The sum of \$50,000 should said Sarita E. Barclay be survived by her husband, Sir Colville Barclay, which sum the Trustee is in that event directed to pay to said Sir Colville Barclay upon the death of said Sarita E. Barclay.

and after making such exceptions and reservations, the resultant remainder shall be paid over to the descendants of the said Sarita E. Barclay then living in equal shares *per stirpes* and not *per capita*. In the event that the said Sarita E. Barclay shall die, leaving no descendants her surviving, then to pay over the resultant remainder to the party of the first part should he be living, and, if dead, to distribute the same in equal shares among the descendants of the party of the first part *per stirpes* and not *per capita*.

In making such payments and distribution to the former annuitants aforesaid or to the remaindermen above described, the Trustee is authorized to use and deliver in kind the assets held in the corpus of the said Sarita E. Barclay Trust, in whatever form it may be at that time invested.

To Have and to Hold the property described as the 'Frances G. Phipps Trust', upon Schedule C, hereto annexed, to the Trustee and its successors to collect and receive the interest, income and profits thereof and out of the said income during the natural life of Frances G. Phipps to pay the following annuities as hereinafter provided, namely, to



(1) Emily A. Sanford, (the wife of the party of the first part) an annuity of \$17,000 payable quarterly during her natural life. Until different instructions are received from Emily A. Sanford all payments are to be made to the Freehold Trust Company for deposit to the credit of her account and the receipt of said Trust Company shall be full acquittance to the Trustee.

(2) Mary Elizabeth Sanford, an annuity of \$1,000 payable quarterly during her natural life.

(3) Delia Sanford (daughter of Mary Elizabeth Sanford) an annuity of \$300 payable quarterly during her natural life.

[fol. 139] (4) Sarah Elizabeth Wyckoff, (a sister of the party of the first part) an annuity of \$1,300 during her natural life.

(5) Anna Grace Naquin, (a daughter of Sarah Elizabeth Wyckoff) an annuity of \$300 payable quarterly during her natural life, and should she die before the younger of her two children Edward Clinton Harvey and Grace Elizabeth Harvey shall have attained the age of twenty-one years, the said annuity shall be continued for the benefit of said minor children or the survivor of them during their minority, the amount thereof to be paid to Sarah Elizabeth Wyckoff and Mabel Wyckoff jointly or severally for the support of said minors.

(6) Mary Anna Miller, (a sister of the party of the first part) an annuity of \$1,300 payable quarterly during her natural life.

(7) Frederick J. Sanford, (a nephew of the party of the first part) and to his wife jointly, and to the survivor of them, an annuity of \$1,000 payable quarterly, for the purpose of aiding in the support of the mother, sisters and brothers of said Frederick J. Sanford; this annuity to terminate upon the death of the survivor of said Frederick J. Sanford and his wife.

(8) Mamie Crisp and Louis Crisp (daughter and son-in-law of William A. Sanford, a brother of the party of the first part) and to the survivor of them an annuity of \$500 payable quarterly to be used and applied for the benefit of their daughter Jeannette Crisp as long as she lives,

and after her death the said annuity shall be paid the said Mamie Crisp and Louis Crisp, or the survivor of them during their natural lives without restriction or limitations as to its use or application. The receipt of said Mamie Crisp and, or, Louis Crisp for such payments shall be full acquittance and discharge of the Trustee with respect to such payments.

(9) Joseph A. Sanford, (a nephew of the party of the first part) an annuity of \$300 payable quarterly during his natural life.

(10) Jacob Horace Sanford, (a nephew of the party of the first part) an annuity of \$500 payable quarterly during his natural life.

[fol. 140] (11) Margaret Sanford, (widow of Charles Sanford, son of William A. Sanford) an annuity of \$150 payable quarterly during her natural life.

(12) Jacob Vanzandt Wyckoff and his wife Neola Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff) and to the survivor of them, an annuity of \$650 payable quarterly during their natural lives.

(13) Charles S. Wyckoff, (son of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during his natural life.

(14) Mabel Wyckoff, (daughter of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during her natural life.

(15) Frank Wyckoff, (son of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during his natural life.

(16) John Henry Wyckoff and his wife Carrie Estelle Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff) an annuity of \$300 payable quarterly and to the survivor of them during their natural lives.

(17) Charles S. Miller and Harriet Miller his wife (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$300 payable quarterly during their respective lives.

(18) Dr. James D. Miller, (son of Annie Miller) an annuity of \$650 payable quarterly during his natural life, and upon his death such annuity to be continued to his wife Mona Miller during her natural life.

(19) Elizabeth Bates, (daughter of Annie Miller) an annuity of \$300 payable quarterly during her natural life.

(20) Sarah F. Yard, (daughter of Annie Miller) an annuity of \$400 payable quarterly during her natural life.

(21) Robert C. Miller and Frances Miller, (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$1,000 payable quarterly during their natural lives.

[fol. 141] (22) Daniel E. Sanford, (son of Tylee Sanford) an annuity of \$400 payable quarterly during his natural life.

(23) Garrett T. Sanford and Emma Sanford, (son and daughter-in-law of Tylee Sanford) and to the survivor of them, an annuity of \$1,200 payable quarterly during their natural lives.

(24) Margaret Irene Sanford, (daughter-in-law of Tylee Sanford) an annuity of \$300 payable quarterly to be by her used and applied for the benefit of herself and family as she may see fit, during her natural life, and upon her death to continue the payment of said annuity to her husband Frank A. Sanford, during his natural life.

(25) Henry P. Sanford and Viola Sanford, (son and daughter-in-law of Tylee Sanford) and the survivor of them, an annuity of \$300 payable quarterly during their natural lives.

(26) Lizzie Henderson Sanford, (daughter-in-law of Tylee Sanford) an annuity of \$500 payable quarterly, to be used and applied for the benefit of herself and family as she may see fit during her natural life, and upon her death to continue the payment of said annuity to her children in equal shares during their respective minorities.

(27) Ollie Cross, (daughter of Tylee Sanford) wife of Milton Cross, an annuity of \$300 payable quarterly during her natural life.

(28) Elizabeth Adams, (daughter of Tylee Sanford) wife of Eleigh Adams, an annuity of \$400 payable quarterly.

(29) Elizabeth Sanford, (widow of Tylee Sanford) an annuity of \$300 payable quarterly during her natural life.

(30) Louise Tilton, an annuity of \$500 payable quarterly during her natural life.

(31) James Billett, (valet to the party of the first part) an annuity of \$200 payable quarterly during his natural life.

(32) Eunice Stokes Cocks, (daughter of Gertrude S. Cocks) an annuity of \$150 per annum, which sum shall be [fol. 142] paid January 1, 1923 and on each January 1st thereafter during the life of said Eunice Stokes Cocks to Gertrude S. Cocks, mother of said Eunice Stokes Cocks, to be applied for her benefit during her minority and thereafter to be paid directly to said Eunice Stokes Cocks during her natural life. During the minority of said Eunice Stokes Cocks—receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the Trustee with respect to such payments.

(33) Rowland E. Cocks, Jr., (son of Gertrude S. Cocks) an annuity of \$150 per annum, which sum shall be paid January 1, 1923 and on each January 1st thereafter during the life of said Rowland E. Cocks, Jr., to Gertrude S. Cocks, mother of Rowland E. Cocks, Jr., to be applied for his benefit during his minority and thereafter to be paid directly to said Rowland E. Cocks, Jr., during his natural life. During the minority of said Rowland E. Cocks, Jr.—receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the Trustee with respect to such payments.

(34) Reverend Frank R. Symmes and to Elizabeth J. Symmes his wife and to the survivor of them of Freehold, N. J., an annuity of \$350 per annum payable quarterly during their natural lives.

(35) Alfred Bird, (secretary to the party of the first part) an annuity of \$700 payable quarterly during his natural life, or until such time as the party of the first part, or his wife, Emily A. Sanford shall notify the Trustee that said Alfred Bird is no longer in his or her employ, or is not rendering satisfactory service as such employee.

(36) Muriel Jane Bird, (daughter of Alfred Bird) an annuity of \$350 payable quarterly during her natural life. Such annuity, however, is not to commence until the death of said Alfred Bird, nor unless said Alfred Bird was in the

employ of the party of the first part, or his wife Emily A. Sanford at the time of said Alfred Bird's death, it being intended that said annuity shall be a continuation in a reduced amount of the annuity formerly payable to her father Alfred Bird.

And after payment of said annuities together with the expenses and commissions of the said Trustee to apply the [fol. 143] residue of the net income to the use of Frances G. Phipps during the time of her natural life. Upon the death of said Frances G. Phipps there shall be excepted and reserved from the corpus of the trust fund theretofore held as the Frances G. Phipps Trust:

(1) Such sums as in the unrestricted judgment and discretion of the Trustee may be necessary to purchase equivalent annuities for each of the persons then surviving to whom an annuity has been granted and made a prior charge against the income aforesaid, or in lieu thereof such sums as the Trustee may deem necessary to commute and satisfy such equivalent annuities full power and discretion being hereby vested in the Trustee to make such settlement or to effect such arrangement for the satisfaction of such annuities.

(2) The sum of \$50,000 should said Frances G. Phipps be survived by her husband, Eric Phipps, which sum the Trustee is in that event directed to pay to said Eric Phipps upon the death of said Frances G. Phipps.

and after making such exceptions and reservations, the resultant remainder shall be paid over to the descendants of the said Frances G. Phipps then living in equal shares *per stirpes* and not *per capita*. In the event that the said Frances G. Phipps shall die, leaving no descendants her surviving, then to pay over the resultant remainder to the party of the first part should he be living, and, if dead, to distribute the same in equal shares among the descendants of the party of the first part *per stirpes* and not *per capita*.

In making such payments and distribution to the former annuitants aforesaid or to the remaindermen above described, the Trustee is authorized to use and deliver in kind the assets held in the corpus of the said Frances G. Phipps Trust, in whatever form it may be at that time invested.

To Have and to Hold the property described as the 'Herbert Sanford Ward Trust', upon Schedule D hereto



annexed, to the Trustee and its successors to collect and receive the interest, income and profits thereof and out of the said income during the natural life of Herbert Sanford Ward to pay the following annuities as hereinafter provided, namely, to.

(1) Emily A. Sanford, (the wife of the party of the first part) an annuity of \$16,000 payable quarterly during her [fol. 144] natural life. Until different instructions are received from Emily A. Sanford all payments are to be made to the Freehold Trust Company for deposit to the credit of her account and the receipt of said Trust Company shall be full acquittance to the Trustee.

(2) Mary Elizabeth Sanford, an annuity of \$1,000 payable quarterly during her natural life.

(3) Delia Sanford, (daughter of Mary Elizabeth Sanford) an annuity of \$400 payable quarterly during her natural life.

(4) Sarah Elizabeth Wyckoff, (a sister of the party of the first part) an annuity of \$1,400 during her natural life.

(5) Anna Grace Naquin, (a daughter of Sarah Elizabeth Wyckoff) an annuity of \$400 payable quarterly during her natural life, and should she die before the younger of her two children Edward Clinton Harvey and Grace Elizabeth Harvey shall have attained the age of twenty-one years, the said annuity shall be continued for the benefit of said minor children or the survivor of them during their minority, the amount thereof to be paid to Sarah Elizabeth Wyckoff and Mabel Wyckoff jointly or severally for the support of said minors.

(6) Mary Anna Miller, (a sister of the party of the first part) an annuity of \$1,400 payable quarterly during her natural life.

(7) Frederick J. Sanford, (a nephew of the party of the first part) and to his wife jointly, and to the survivor of them, an annuity of \$1,000 payable quarterly, for the purpose of aiding in the support of the mother, sisters and brothers of said Frederick J. Sanford; this annuity to terminate upon the death of the survivor of said Frederick J. Sanford and his wife.

(8) Mamie Crisp and Louis Crisp, (daughter and son-in-law of William A. Sanford, a brother of the party of the first part) and to the survivor of them an annuity of \$500 payable quarterly to be used and applied for the benefit of their daughter, Jeannette Crisp, as long as she lives, and after her death the said annuity shall be paid the said Mamie [fol. 145] Crisp and Louis Crisp, or the survivor of them during their natural lives without restriction or limitations as to its use or application. The receipt of said Mamie Crisp and, or, Louis Crisp for such payments shall be full acquittance and discharge of the Trustee with respect to such payments.

(9) Joseph A. Sanford, (a nephew of the party of the first part) an annuity of \$400 payable quarterly during his natural life.

(10) Jacob Horace Sanford, (a nephew of the party of the first part) an annuity of \$500 payable quarterly during his natural life.

(11) Margaret Sanford, (widow of Charles Sanford, son of William A. Sanford) an annuity of \$200 payable quarterly during her natural life..

(12) Jacob Vanzandt Wyckoff and his wife Neola Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff) and to the survivor of them, an annuity of \$700 payable quarterly during their natural lives.

(13) Charles S. Wyckoff, (son of Sarah E. Wyckoff) an annuity of \$400 payable quarterly during his natural life.

(14) Mabel Wyckoff, (daughter of Sarah E. Wyckoff) an annuity of \$400 payable quarterly during her natural life.

(15) Frank Wyckoff, (son of Sarah E. Wyckoff) an annuity of \$400 payable quarterly during his natural life.

(16) John Henry Wyckoff and his wife Carrie Estelle Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff) an annuity of \$400 payable quarterly and to the survivor of them during their natural lives.

(17) Charles S. Miller and Harriet Miller his wife (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$400 payable quarterly during their respective lives.

(18) Dr. James D. Miller, (son of Annie Miller) an annuity of \$700 payable quarterly during his natural life, and [fol. 146] upon his death such annuity to be continued to his wife Mona Miller during her natural life.

(19) Elizabeth Bates, (daughter of Annie Miller) an annuity of \$300 payable quarterly during her natural life.

(20) Sarah F. Yard, (daughter of Annie Miller) an annuity of \$300 payable quarterly during her natural life.

(21) Robert C. Miller and Frances Miller, (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$1,000 payable quarterly during their natural lives.

(22) Daniel E. Sanford, (son of Tylee Sanford) an annuity of \$300 payable quarterly during his natural life.

(23) Garrett T. Sanford and Emma Sanford, (son and daughter-in-law of Tylee Sanford) and to the survivor of them, an annuity of \$1,100 payable quarterly during their natural lives.

(24) Margaret Irene Sanford, (daughter-in-law of Tylee Sanford) an annuity of \$300 payable quarterly to be by her used and applied for the benefit of herself and family as she may see fit, during her natural life, and upon her death to continue the payment of said annuity to her husband Frank A. Sanford, during his natural life.

(25) Henry P. Sanford and Viola Sanford, (son and daughter-in-law of Tylee Sanford) and the survivor of them, an annuity of \$400 payable quarterly during their natural lives.

(26) Lizzie Henderson Sanford, (daughter-in-law of Tylee Sanford) an annuity of \$500 payable quarterly, to be used and applied for the benefit of herself and family as she may see fit during her natural life, and upon her death to continue the payment of said annuity to her children in equal shares during their respective minorities.

(27) Ollie Cross, (daughter of Tylee Sanford) wife of Milton Cross, an annuity of \$400 payable quarterly during her natural life.

(28) Elizabeth Adams, (daughter of Tylee Sanford) wife [fol. 147] of Eleigh Adams, an annuity of \$300 payable quarterly during her natural life.

(29) Elizabeth Sanford, (widow of Tylee Sanford) an annuity of \$300 payable quarterly during her natural life.

(30) Louise Tilton, an annuity of \$500 payable quarterly during her natural life.

(31) James Billett, (valet to the party of the first part) an annuity of \$200 payable quarterly during his natural life.

(32) Eunice Stokes Cocks, (daughter of Gertrude S. Cocks) an annuity of \$150 per annum, which sum shall be paid January 1, 1923 and on each January 1st thereafter during the life of said Eunice Stokes Cocks to Gertrude S. Cocks, mother of said Eunice Stokes Cocks, to be applied for her benefit during her minority and thereafter to be paid directly to said Eunice Stokes Cocks during her natural life. During the minority of said Eunice Stokes Cocks—receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the Trustee with respect to such payments.

(33) Rowland E. Cocks, Jr., (son of Gertrude S. Cocks), an annuity of \$200 per annum, which sum shall be paid January 1, 1923 and on each January 1st thereafter during the life of said Rowland E. Cocks, Jr., to Gertrude S. Cocks, mother of said Rowland E. Cocks, Jr., to be applied for his benefit during his minority and thereafter to be paid directly to said Rowland E. Cocks, Jr., during his natural life. During the minority of said Rowland E. Cocks, Jr.—receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the Trustee with respect to such payments.

(34) Reverend Frank R. Symmes and to Elizabeth J. Symmes his wife and to the survivor of them of Freehold, N. J., an annuity of \$350 per annum payable quarterly during their natural lives.

(35) Alfred Bird, (secretary to the party of the first part) an annuity of \$650 payable quarterly during his natural life, or until such time as the party of the first part, [fol. 148] or his wife, Emily A. Sanford shall notify the Trustee that said Alfred Bird is no longer in his or her employ, or is not rendering satisfactory service as such employee.

(36) Mariel Jane Bird (daughter of Alfred Bird) an annuity of \$350 payable quarterly during her natural life.

Such annuity, however, is not to commence until the death of said Alfred Bird, nor unless said Alfred Bird was in the employ of the party of the first part, or his wife, Emily A. Sanford at the time of said Alfred Bird's death, it being intended that said annuity shall be a continuation in a reduced amount of the annuity formerly payable to her father, Alfred Bird.

And after payment of said annuities together with the expenses and commissions of said Trustee to apply the residue of the net income to the use of Herbert Sanford Ward during the time of his natural life. Upon the death of the said Herbert Sanford Ward there shall be excepted and reserved from the corpus of the trust fund theretofore held as the Herbert Sanford Ward Trust:

(1) Such sums as in the unrestricted judgment and discretion of the Trustee may be necessary to purchase equivalent annuities for each of the persons then surviving to whom an annuity has been granted and made a prior charge against the income aforesaid, or in lieu thereof such sums as the Trustee may deem necessary to commute and satisfy such equivalent annuities full power and discretion being hereby vested in the Trustee to make such settlement or to effect such arrangement for the satisfaction of such annuities.

(2) The sum of \$50,000 should said Herbert Sanford Ward be survived by his wife Joyce Ward, which sum the Trustee is in that event directed to pay to said Joyce Ward upon the death of said Herbert Sanford Ward.

and after making such exceptions and reservations, the resultant remainder shall be paid over to the descendants of the said Herbert Sanford Ward then living in equal shares per stirpes and not per capita. In the event that the said Herbert Sanford Ward shall die, leaving no descendants him surviving, then to pay over the resultant remainder to the party of the first part should he be living, and, if dead, to distribute the same in equal shares among the descendants of the party of the first part per stirpes and not per capita.

[fol. 149] In making such payments and distribution to the former annuitants aforesaid or to the remaindermen above described, the Trustee is authorized to use and de-



liver in kind the assets held in the corpus of the said Herbert Sanford Ward Trust, in whatever form it may be at that time invested.

Provided Always Nevertheless that as to each and every trust created hereunder the following provisions shall apply and govern:

1. It shall be lawful for the Trustee to continue to hold any investment, security or other property hereby granted or hereafter added to the trust estate unless the Trustee be directed in writing by the party of the first part to dispose of the same. Nevertheless, the Trustee is authorized to dispose of any investment, security or other property at public or private sale, or by exchange of securities, without direction from the party of the first part, but the Trustee shall not be liable for its failure to dispose of any such investment unless it be directed by the party of the first part to make such change of investment. The Trustee shall be protected with respect to all changes of investments by sale, exchange or reinvestment when its action has been taken pursuant to the written direction of the party of the first part, it being understood and agreed that both investments and reinvestments hereunder may be made in securities not permitted by law as trust investments, if such investments or reinvestments are made pursuant to the direction of the party of the first part.

Either with or without the written direction of the party of the first part, the Trustee may extend an investment which may become due, consent to the reorganization or consolidation of any corporation or sale to any other corporation or person of the property of any corporation, the stocks, bonds or other securities of which are at the time held by said Trustee, and likewise either with or without the written direction of the party of the first part, the Trustee may make exchanges of securities and do any act with reference thereto which the Trustee may deem necessary, proper or expedient, including the payment of moneys to enable the said Trustee to obtain the benefit of such reorganization, consolidation or sale of such stocks, bonds or other securities held by said Trustee, and to exercise any option for conversion or additional subscription extended by any such corporation, or in respect to any such stocks, bonds or other securities, and, either with or without such direction from the party of the first part, to make

# MICRO CARD

TRADE

MARK



22

39



1081

2

65



[fol. 150] such conversions and subscriptions and to make any necessary payments therefor, and to hold such new securities in said trust without any liability on the part of the Trustee for any act by it taken in good faith, pursuant to the power to it herein granted.

During the lifetime of the party of the first part, the Trustee may execute full and unlimited proxies to exercise the voting powers upon any stock or securities, forming a part of the trust estates, to the party of the first part, or to such person or persons as the party of the first part may direct. After the death of the party of the first part, the Trustee may give such proxies to such person or persons as it in its discretion may select. The Trustee is authorized to continue any investment of which the Trust estates may consist at the time of the death of the party of the first part and after the death of the party of the first part, the Trustee may as to each and every such investments participate in reorganizations, consolidations, or exchanges pursuant to the refinancing of corporations whose securities form a part of the trust estates, applying if the Trustee deems it advisable, cash out of principal account for such purpose, and the Trustee may continue to hold the new securities issuable to it as the result of such participation. Except as to participation in such reorganizations, consolidations and exchanges aforesaid, the Trustee after the death of the party of the first part shall make all re-investments in such property and securities as are by the law of New York legal investments for Trustees.

The said Trustee shall be under no liability whatsoever for any loss which may arise from the exercise by the Trustee or its failure to exercise any of the powers herein contained.

2. The party of the first part may either in his lifetime or by last will and testament add to the property constituting the corpus of the respective trusts or of any of them such other property as he may from time to time transfer to the Trustee for that purpose and all such property so transferred in his lifetime shall be designated and described by suitable description thereof indicating the distribution of such property among the respective trusts over the signature of the party of the first part and shall thereupon become subject to all the trusts, powers and limitations hereinbefore expressed with regard to property constituting the respective trusts to which the same are to be added.

3. All income herein required to be distributed and paid over by the Trustee shall be distributed in quarter yearly [fol. 151] payments on the first day of January, April, July and October in each year at which time the annuity payments shall likewise be made, except in those cases where a different date of payment is expressly described in the foregoing clauses specifically providing for such annuity payments.

4. The Trustee shall receive in full for its compensation for acting as Trustee of the trusts herein created in addition to its necessary expenses, a commission at the rate of One per cent (1%) on the amount of all income received by it and a commission of one-half of one per cent ( $\frac{1}{2}$  of 1%) on each distribution or other payment of capital.

5. The Trustee shall not be responsible for any diminution of the trust estates resulting from depreciation of securities or property in which it shall have been invested in good faith, and the Trustee shall not be responsible for mistakes or errors in judgment, but shall be responsible only for fraud or wilful misconduct of the Trustee, its officers and agents.

6. With respect to each and every annuity hereinbefore recited to be paid for the benefit of any person other than the person to whom the same shall be payable the Trustee shall be under no duty whatsoever to see to the application thereof by any person to whom such annuity is directed to be paid hereby and the receipt of the latter shall be full and ample protection to the Trustee for all purposes hereunder.

7. No sums payable to annuitants shall accrue in favor of said annuitants until the actual date required for their payment.

8. The party of the first part however reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the Trustee; but this right of modification, however, shall in no way be deemed or construed to include any rights or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument."



In all other respects except as modified by this Supplemental Indenture and the Supplemental Indentures herein [fol. 152] before referred to, the said Indenture of December 24, 1913 is hereby reaffirmed and ratified especially including the right of the party of the first part to modify any or all of the trusts originally created or modified by said Supplemental Indentures aforesaid.

In Witness Whereof the party of the first part has hereunto set his hand and seal and the party of the second part has caused its corporate seal to be affixed and these presents to be signed by its Vice-President the day and year first above written.

(Seal.)

C. H. Sanford. Guaranty Trust Company of New York, by F. J. H. Sutton, Vice-President.

Attest: C. M. Schmidt, Assistant Secretary.

(Seal.)

STATE OF NEW YORK,  
County of New York, ss:

On the 20th day of November, in the year One thousand nine hundred and twenty-two, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

James L. Conway, Notary Public, N. Y. County. New York County Clerk's No. 558. New York County Register's No. 4496. Certificate filed in Bronx County. Bronx County Clerk's No. 42. Bronx County Register's No. 206. Certificate filed in Westchester County. Westchester County Clerk's No. —. Westchester County Register's No. —. Commission expires March 30th, 1924.

(Seal.)

[fol. 153] STATE OF NEW YORK,  
County of New York, ss:

On the 20th day of November, in the year One thousand nine hundred and twenty-two, before me personally came Frederick J. H. Sutton, to me known, who, being by me duly sworn, did depose and say: that he resides in New



York City, New York, and is a Vice-President of Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

James L. Conway, Notary Public, N. Y. County.  
New York County Clerk's No. 558. New York  
County Register's No. 4496. Certificate filed in  
Bronx County. Bronx County Clerk's No. 42.  
Bronx County Register's No. 206. Commission  
expires March 30, 1924.

C. H. S.

(Seal.)

[fol. 154]

EXHIBIT "1"

Par Value

\$68,750.	Anglo Argentine Tramway Co., Ltd. 4% Debenture Stock (£5 par)
12,500.	Anglo Argentine Tramway Co., Ltd. 5% Debenture Stock (£5 par)
12,500.	Argentine Republic 4's, 1961
62,500.	Baltimore & Ohio 4's, 1959
12,500.	Brazil Northeastern 1st Debenture Stock
75,000.	Central Argentine Railway Co., Ltd., 6's, 1927
12,500.	Central Argentine Railway Co., Ltd., 6's, 1927
625,000.	Central Argentine Railway, Ltd. Consoli- dated Ordinary Stock
31,250.	Central Arkansas & Eastern 1st 5's, 1940
6,250.	Chaplin, Milne, Grenfell & Co. Pfd. Stock (£10 par)
25,000.	Chicago, Milwaukee & St. Paul 4's, 1934
15,000.	Chicago, Rock Island & Pacific 4's, 1934
60,500.	City of Bordeaux 6's, 1934
44,000.	City of Lyons 6's, 1934
46,500.	City of Marseilles 6's, 1934
100,000.	City of Montivedeo 5's, 1939
6,750.	City of New York 4½'s, 1967
15,000.	Cleveland, Cincinnati, Chicago & St. Louis 4's, 1993

## EXHIBIT "1"—Continued

## Par Value

12,000.	Colorado & Southern 4's, 1929
1,250.	Freehold Trust Company C/S (\$100. par)
15,000.	Government of French Republic 8's, 1945
62,500.	Great Falls Power 5's, 1940
11,250.	Guaranty Trust Company of New York C/S (\$100 par)
2,500.	J. G. White Company Preferred
15,000.	Kansas City Southern 5's, 1950
24,500.	Kingdom of Belgium 7½'s 1945
12,500.	Lake Shore & Michigan Southern 4's, 1931
62,500.	Lake Shore Electric Railway 5's, 1933
50,000.	Lanman & Kemp Inc., Preferred (\$100. par)
2,500.	Lanman & Kemp Inc., Common (\$100. par)
47,500.	Mississippi River & Bonne Terre 5's, 1931
12,500.	New York Central & Hudson River Railroad 4's, 1942
3,000.	New York Telephone 4½'s 1939

C. H. Sanford.

F. J. H. Sutton.

[fol. 155]

6,250.	Oriental Republic of Uruguay 3½'s
15,000.	Pennsylvania Railroad 4½'s 1965
15,000.	Rio Grande Western 4's 1929
15,000.	St. Louis, San Francisco 4's, 1950
15,000.	St. Louis Southwestern 4's, 1989
62,500.	St. Louis Southwestern 5's, 1952
440,000.	Samuel B. Hale Company, Ltd. C/S (\$440. par or 1,000 pesos each)
18,000.	Southern Pacific 4's, 1949
75,000.	Southern Railway 4's, 1956
25,000.	Stevensville North & South Texas 1st 5's, 1940
6,175.	Underground Electric Railway Co. of London, Ltd. 4½'s, 1933
2,000.	Government of Argentine Republic 7's, 1927
11,742.59	Cash

\$2,272,667.59

C. H. Sanford.

F. J. H. Sutton.

## [fol. 156] Colville Herbert Sanford-Barclay Trust

## SCHEDULE "A"

\$155,000	par value	Central Argentine Railway Company Consolidated Ord. Stock (31,000 shares no par value, carried at £1 for convenience)
4,000	" "	Southern Pacific First Refunding Mortgage 4's 1955
3,000	" "	Chicago, Milwaukee and St. Paul 4's 1934
2,000	" "	Chicago, Milwaukee and Puget Sound 4's 1949
5,000	" "	Union Pacific 1st Lien and Refunding 4's 2008
6,000	" "	Central Argentine Railway Ltd. 10 Yr. 6's 1927
14,200	" "	United Kingdom of Great Britain & Ireland 5½'s 1929
400	" "	U. S. A. Second Liberty Loan 4¼'s 1942
1,000	" "	Chesapeake & Ohio Equipment Trust 6½'s 1932
1,000	" "	City of Bordeaux External Loan 6's 1934
2,500	" "	City of Lyons External Loan 6's 1934
1,500	" "	City of Marseilles External Loan 6's 1934
6,000	" "	Government of Argentine Nation 7's 1927

\$201,600

Total

C. H. Sanford.

F. J. H. Sutton.

[fol. 157]

## Sarita E. Barclay Trust

## SCHEDULE "B"

Par Value	
91,666.66	Anglo Argentine Tramways Co. Ltd. 4% Deb. Stock (@ £5 par)
16,666.66	Anglo Argentine Tramways Co. Ltd. 5% Deb. Stock (@ £5 par)
16,666.66	Argentine Republic 4's, 1961
83,333.33	Baltimore & Ohio 4's, 1959

## SCHEDULE "C"—Continued

## Par Value

9,000.00	City of New York 4½'s, 1967
20,000.00	Cleveland, Cincinnati, Chicago & St. Louis 4's, 1993
16,000.00	Colorado & Southern 4's, 1929
1,666.66	Freehold Trust Company, C/S (@ \$100 par)
20,000.00	Government of French Republic 8's, 1945
83,333.33	Great Falls Power 5's, 1940
15,000.00	Guaranty Trust Company of New York C/S (@ \$100 par)
3,333.33	J. G. White Company, Preferred
20,000.00	Kansas City Southern 5's, 1950
31,666.66	Kingdom of Belgium 7½'s, 1945
16,666.66	Lake Shore & Michigan Southern 4's, 1931
83,333.33	Lake Shore Electric Railway 5's, 1933
66,666.66	Lanman & Kemp Inc., Preferred (@ \$100 par)
3,333.33	Lanman & Kemp Inc., Common (@ \$100 par)
63,333.33	Mississippi River & Bonne Terre 5's, 1931
16,666.66	New York Central & Hudson River Railroad 4's, 1942

[fol. 160]

4,000.00	New York Telephone 4½'s, 1939
8,333.33	Oriental Republic of Uruguay 3½'s
20,000.00	Pennsylvania Railroad 4½'s, 1965
20,000.00	Rio Grande Western 4's, 1939
20,000.00	St. Louis, San Francisco 4's, 1950
20,000.00	St. Louis Southwestern 4's, 1989
83,333.33	St. Louis Southwestern 5's, 1952
586,666.66	Samuel B. Hale Co. Ltd. C/S (@ \$440 par or 1,000 pesos)
24,000.00	Southern Pacific 4's, 1949
100,000.00	Southern Railway 4's, 1956
33,333.33	Stevensville North & South Texas 1st 5's, 1940
8,233.33	Underground Electric Railways Co. of London Ltd., 4½'s, 1933
2,666.66	Government of Argentine Nation 7's, 1927
15,622.45	Cash

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\$3,029,188.97 Total

C. H. Sanford

F. J. H. Sutton.

[fol. 161]

## Herbert Sanford Ward Trust

## SCHEDULE "D"

## Par Value

\$91,666.66	Anglo Argentine Tramway Co. Ltd. 4% Deb. Stock (£5 par)
16,666.66	Anglo Argentine Tramway Co. Ltd. 5% Deb. Stock (£5 par)
16,666.66	Argentine Republic 4's, 1961
83,333.33	Baltimore & Ohio 4's, 1959
16,666.66	Brazil Northeastern 1st Debenture Stock
100,000.00	Central Argentine Railway Co. Ltd. 6's, 1927
16,666.66	Central Argentine Railway Co. Ltd. 6's, 1927
833,333.33	Central Argentine Railway Co. Ltd. Cons. Ordinary Stock
41,666.66	Central Arkansas & Eastern 1st 5's, 1940
8,333.33	Chaplin, Milne, Grenfell & Co. Pfd. Stock (£10 par)
33,333.33	Chicago, Milwaukee & St. Paul 4's, 1934
20,000.00	Chicago, Rock Island & Pacific 4's, 1934
80,666.66	City of Bordeaux 6's, 1934
58,666.66	City of Lyons 6's, 1934
62,000.00	City of Marseilles 6's, 1934
133,333.33	City of Montevideo 5's, 1939
9,000.00	City of New York 4½'s, 1967
20,000.00	Cleveland, Cincinnati, Chicago & St. Louis 4's, 1993
16,000.00	Colorado & Southern 4's, 1929
1,666.66	Freehold Trust Company Capital Stock (\$100 par)
20,000.00	Government of French Republic 8's, 1945
83,333.33	Great Falls Power 5's, 1940
15,000.00	Guaranty Trust Company of New York Capital Stock (\$100 par)
3,333.33	J. G. White Company, Preferred
20,000.00	Kansas City Southern 5's, 1950
32,666.66	Kingdom of Belgium 7½'s, 1945
16,666.66	Lake Shore & Michigan Southern 4's, 1931
83,333.33	Lake Shore Electric Railway 5's, 1933
66,666.66	Lanman & Kemp Inc., Preferred (\$100 par)
3,333.33	Lanman & Kemp Inc., Common (\$100 par)
63,333.33	Mississippi River & Bonne Terre 5's, 1931
16,666.66	New York Central & Hudson River Railroad 4's, 1942
4,000.00	New York Telephone 4½'s, 1939



## SCHEDULE "D"—Continued

[fol. 162]

## Par Value

8,333.33	Oriental Republic of Uruguay 3½'s
20,000.00	Pennsylvania Railroad 4½'s, 1965
20,000.00	Rio Grande Western 4's, 1939
20,000.00	St. Louis, San Francisco 4's, 1950
20,000.00	St. Louis Southwestern 4's, 1989
83,333.33	St. Louis Southwestern 5's, 1952
586,666.66	Samuel B. Hale Co., Ltd. C/S (\$440 par or 1,000 pesos)
24,000.00	Southern Pacific 4's, 1949
100,000.00	Southern Railway 4's, 1956
33,333.33	Stevensville North & South Texas 1st 5's, 1940
8,233.33	Underground Electric Railways Co. of London, Ltd. 4½'s, 1933
2,666.66	Government of Argentine Nation 7's, 1927
15,803.41	Cash
<u>\$3,030,369.93</u>	<b>Total</b>

C. H. Sanford.

F. J. H. Sutton.

[fol. 163] This Supplemental Indenture made the 21st day of December in the year one thousand nine hundred and twenty-three, between Charles Henry Sanford of Freehold, Monmouth County, State of New Jersey, party of the first part and Guaranty Trust Company of New York, (hereinafter for convenience termed the "Trustee"), a corporation organized and existing under the laws of the State of New York, with its principal office and place of business at No. 140 Broadway, New York, N. Y.

Witnesseth, That Whereas, by Indenture dated the 24th day of December, 1913 between the parties hereto, the party of the first part did create various trusts in property, of which the party of the second part was made Trustee, and

Whereas Indentures supplemental thereto have been executed by the said parties respectively dated February 15, 1916, September 6, 1916, August 17, 1917, December 19, 1917, June 28, 1918, August 16, 1918, May 23, 1919, November 26, 1919, March 16, 1920, November 25, 1921 and Novem-

ber 20, 1922 by which Supplemental Indentures (which together with the Indenture of December 24, 1913 are hereinafter for convenience termed the "Trust Indentures") additions to the trusts created by the Indenture of December 24, 1913 have been made by the party of the first part, modifications have been made with respect to such trusts pursuant to the right reserved in the party of the first part by the terms of the Trust Indentures; and,

Whereas the party of the first part desires to make certain further modifications pursuant to the power reserved to him,

Now, Therefore, and pursuant to the power reserved to the party of the first part by the Trust Indentures, the party of the first part by this Supplemental Indenture does hereby identify and hereby confirm his previous conveyance to the Trustee of the property respectively described in the schedules hereto annexed. Said schedules A, B, C and D respectively describe the present corpus and principal of the four trusts respectively created and for convenience therein and hereinafter described as "Colville Herbert Sanford Barclay Trust," "Sarita E. Barclay Trust," "Frances G. Phipps Trust" and "Herbert Sanford Ward Trust." And the party of the first part does hereby ratify each and every act [fol. 164] of the Trustee heretofore taken with respect to the investments in said schedules described, and with respect to all other acts of the Trustee pursuant to the Trust Indentures.

The terms and conditions upon which the property granted, bargained, sold, assigned, transferred and set over unto the Trustee are hereby modified so that the same shall now read as follows:

"To Have and to Hold the property described as the 'Colville Herbert Sanford-Barclay Trust' upon Schedule A hereto annexed to the trustee and its successors to collect and receive the interests, income and profits thereof during the natural life of Colville Herbert Sanford-Barclay, a great grandson of the party of the first part, and accumulate the said income and profits during the minority of the said Colville Herbert Sanford-Barclay, and when he shall have attained the age of twenty-one years to pay over to him all of the said accumulations of income, and thereafter to apply to the use of Sir Colville Barclay, father of Colville Herbert

## SCHEDULE "B"—Continued

## Par Value

16,666.66	Brazil Northeastern 1st Debenture Stock
100,000.00	Central Argentine Railway Co. Ltd. 6's, 1927
16,666.66	Central Argentine Railway Co. Ltd. 6's, 1927
833,333.33	Central Argentine Railway Co. Ltd. Cons. Ordinary Stock (no par)
41,666.66	Central Arkansas & Eastern 1st 5's, 1940
8,333.33	Chaplin, Milne, Grenfell & Co. Preferred Stock (@ £10 par)
33,333.33	Chicago, Milwaukee & St. Paul 4's, 1934
20,000.00	Chicago, Rock Island & Pacific 4's, 1934
80,166.66	City of Bordeaux 6's, 1934
59,166.66	City of Lyons 6's, 1934
62,000.00	City of Marseilles 6's, 1934
133,333.33	City of Montevideo 5's, 1939
9,000.00	City of New York 4½'s, 1967
20,000.00	Cleveland, Cincinnati, Chicago & St. Louis 4's, 1993
16,000.00	Colorado & Southern 4's, 1929
1,666.66	Freehold Trust Company, C/S (@ \$100 par)
20,000.00	Government of French Republic 8's, 1945
83,333.33	Great Falls Power 5's, 1940
15,000.00	Guaranty Trust Company of New York, C/S (@ \$100 par)
3,333.33	J. G. White Company, Preferred
20,000.00	Kansas City Southern 5's, 1950
31,666.66	Kingdom of Belgium 7½'s, 1945
16,666.66	Lake Shore & Michigan Southern 4's, 1931
83,333.33	Lake Shore Electric Railway 5's, 1933
66,666.66	Lanman & Kemp, Inc., Preferred (@ \$100 par)
3,333.33	Lanman & Kemp, Inc., Common (@ \$100 par)
63,333.33	Mississippi River & Bonne Terre 5's, 1931
16,666.66	New York Central & Hudson River Railroad 4's, 1942
4,000.00	New York Telephone 4½'s, 1939

[fol. 158]

8,333.33	Oriental Republic of Uruguay 3½'s
20,000.00	Pennsylvania Railroad 4½'s, 1965
20,000.00	Rio Grande Western 4's, 1939

## SCHEDULE "B"—Continued

## Par Value

20,000.00	St. Louis, San Francisco 4's, 1950
20,000.00	St. Louis Southwestern 4's, 1989
83,333.33	St. Louis Southwestern 5's, 1952
586,666.66	Samuel B. Hale Company, Ltd. C/S (@ \$440 par or 1,000 pesos)
24,000.00	Southern Pacific 4's, 1949
100,000.00	Southern Railway 4's, 1956
33,333.33	Stevensville North & South Texas 1st 5's, 1940
8,233.33	Underground Electric Railways Co. of London, Ltd. 4½'s, 1933
2,666.66	Government of Argentine Nation 7's, 1927
15,460.20	Cash
<hr/>	
\$3,029,026.72	Total

C. H. Sanford.

F. J. H. Sutton:

[fol. 159]

## Frances G. Phipps Trust

## SCHEDULE "C"

91,666.66	Anglo Argentine Tramways Co. Ltd., 4% Deb. Stock (@ £5 par)
16,666.66	Anglo Argentine Tramways Co. Ltd., 5% Deb. Stock (@ £5 par)
16,666.66	Argentine Republic 4's, 1961
83,333.33	Baltimore & Ohio 4's, 1959
16,666.66	Brazil Northeastern 1st Debenture Stock
100,000.00	Central Argentine Railway Co. Ltd., 6's, 1927
16,666.66	Central Argentine Railway Co. Ltd., 6's, 1927
833,333.33	Central Argentine Railway Co. Ltd., Cons. Ordinary Stock
41,666.66	Central Arkansas & Eastern 1st 5's, 1940
8,333.33	Chaplin, Milne, Grenfell & Co. Preferred Stock (@ £10 par)
33,333.33	Chicago, Milwaukee & St. Paul 4's, 1934
20,000.00	Chicago, Rock Island & Pacific 4's, 1934
80,666.66	City of Bordeaux 6's, 1934
58,666.66	City of Lyons 6's, 1934
62,000.00	City of Marseilles 6's, 1934
133,333.33	City of Montevideo 5's, 1939

Phipps then living in equal shares, per stirpes and not per capita.

And after making such exceptions and reservations, the resultant remainder shall be held in trust by the Trustee and its successors to collect and receive the interest, income and profits thereof and apply the net income to the use of the descendants of the said Frances G. Phipps living at the time of her death, per stirpes and not per capita, during the natural life of Colville Herbert Sanford-Barclay, and upon his death the said resultant remainder shall be paid over to the descendants of the said Frances G. Phipps then living, in equal shares, per stirpes and not per capita. In the event that the said Frances G. Phipps shall die leaving her no descendants her surviving, then to pay over the resultant remainder to the party of the first part should he be living, and if dead to distribute the same in equal shares among the descendants of the party of the first part, per stirpes and not per capita.

In making such payments and distribution to the former annuitants aforesaid or to the remaindermen above described, the Trustee is authorized to use and deliver in kind the assets held in the corpus of the said Frances G. Phipps Trust, in whatever form it may be at that time invested.

To Have and to Hold the property described as the 'Herbert Sanford Ward Trust', upon Schedule D hereto annexed, to the Trustee and its successors to collect and receive the interest, income and profits thereof and out of the said income during the natural life of Herbert Sanford Ward to pay the following annuities as hereinafter provided, namely, to

(1) Emily A. Sanford, (the wife of the party of the first part) an annuity of \$16,000. payable quarterly during her natural life.

[fol. 178] (2) Mary Elizabeth Sanford, an annuity of \$1,000. payable quarterly during her natural life.

(3) Delia Sanford (Daughter of Mary Elizabeth Sanford) an annuity of \$400. payable quarterly during her natural life.

(4) Sarah Elizabeth Wyckoff, (a sister of the party of the first part) an annuity of \$1,400. during her natural life.

(5) Anna Grace Naquin, (a daughter of Sarah Elizabeth Wyckoff) an annuity of \$400. payable quarterly during her



natural life, and should she die before the younger of her two children Edward Clinton Harvey and Grace Elizabeth Harvey shall have attained the age of twenty-one years, the said annuity shall be continued for the benefit of said minor children or the survivor of them during their minority, the amount thereof to be paid to Sarah Elizabeth Wyckoff and Mabel Wyckoff jointly or severally for the support of said minors.

(6) Mary Anna Miller, (a sister of the party of the first part) an annuity of \$1,400. payable quarterly during her natural life.

(7) Frederick J. Sanford, (a nephew of the party of the first part) and to his wife jointly, and to the survivor of them, an annuity of \$1,000. payable quarterly, for the purpose of aiding in the support of the mother, sisters and brothers of said Frederick J. Sanford; this annuity to terminate upon the death of the survivor of said Frederick J. Sanford and his wife.

(8) Mamie Crisp and Louis Crisp, (daughter and son-in-law of William A. Sanford, a brother of the party of the first part) and to the survivor of them an annuity of \$500. payable quarterly to be used and applied for the benefit of their daughter Jeannette Crisp as long as she lives, and after her death the said annuity shall be paid the said Mamie Crisp and Louis Crisp, or the survivor of them during their natural lives without restriction or limitations as to its use or application. The receipt of said Mamie Crisp and, or, Louis Crisp for such payments shall be full acquittance and discharge of the Trustee with respect to such payments.

[fol. 179]. (9) Joseph A. Sanford, (a nephew of the party of the first part) an annuity of \$400. payable quarterly during his natural life.

(10) Jacob Horace Sanford, (a nephew of the party of the first part) an annuity of \$500. payable quarterly during his natural life.

(11) Margaret Sanford, (widow of Charles Sanford, son of William A. Sanford) an annuity of \$200. payable quarterly during her natural life.

(12) Jacob Vanzandt Wyckoff and his wife, Neola Wyckoff (son and daughter-in-law of Sarah E. Wyckoff) and to the

Sanford-Barclay, all of the net income of the said property until the said Colville Herbert Sanford-Barclay shall attain the age of twenty-five years, and thereafter to apply to the use of the said Colville Herbert Sanford-Barclay all of the net income of the said property, and upon his death the trust shall terminate and the trustees shall pay over the said trust fund and all accumulations, if any, thereon to his oldest brother then living, and if there shall be no brother of his living at that time then to pay over and distribute the said principal sum and all accumulated income thereof, if any, to and among the descendants of the party of the first part, per stirpes and not per capita, and if there be no descendants of the party of the first part then living, then to any among nephews and nieces then living of the party of the first part in equal shares, and to the descendants of any deceased nephew or niece, per stirpes and not per capita, the share which would have been taken by such deceased nephew or niece if living, except that the share of Addison Starr Sanford, one of said nephews, shall be paid to his wife or if she be dead to her descendants per stirpes and not per capita.

To Have and to Hold the property described as the 'Sarita E. Barclay Trust', upon Schedule B, hereto annexed, to the Trustee and its successors to collect and receive the interest, income and profits thereof and out of the said income [fol. 165] come during the natural life of Sarita E. Barclay, to pay the following annuities as hereinafter provided, namely, to

(1) Emily A. Sanford, (the wife of the party of the first part) an annuity of \$17,000 payable quarterly during her natural life.

(2) Mary Elizabeth Sanford, an annuity of \$1,000 payable quarterly during her natural life.

(3) Delia Sanford, (daughter of Mary Elizabeth Sanford) an annuity of \$300 payable quarterly during her natural life.

(4) Sarah Elizabeth Wyckoff, (a sister of the party of the first part) an annuity of \$1,300 during her natural life.

(5) Anna Grace Naquin, (a daughter of Sarah Elizabeth Wyckoff) an annuity of \$300 payable quarterly during her natural life, and should she die before the younger of her

two children Edward Clinton Harvey and Grace Elizabeth Harvey shall have attained the age of twenty-one years, the said annuity shall be continued for the benefit of said minor children or the survivor of them during their minority, the amount thereof to be paid to Sarah Elizabeth Wyckoff and Mabel Wyckoff jointly or severally for the support of said minors.

(6) Mary Anna Miller, (a sister of the party of the first part) an annuity of \$1,300 payable quarterly during her natural life.

(7) Frederick J. Sanford, (a nephew of the party of the first part) and to his wife jointly, and to the survivor of them, an annuity of \$1,000 payable quarterly, for the purpose of aiding in the support of the mother, sisters and brothers of said Frederick J. Sanford; this annuity to terminate upon the death of the survivor of said Frederick J. Sanford and his wife.

(8) Mamie Crisp and Louis Crisp (daughter and son-in-law of William A. Sanford, a brother of the party of the first part) and to the survivor of them an annuity of \$500 payable quarterly to be used and applied for the benefit of [fol. 166] their daughter Jeanrette Crisp as long as she lives, and after her death the said annuity shall be paid the said Mamie Crisp and Louis Crisp, or the survivor of them during their natural lives, without restriction or limitations as to its use or application. The receipt of said Mamie Crisp and, or, Louis Crisp for such payments shall be full acquittance and discharge of the Trustee with respect to such payments.

(9) Joseph A. Sanford (a nephew of the party of the first part) an annuity of \$300 payable quarterly during his natural life.

(10) Jacob Horace Sanford, (a nephew of the party of the first part) an annuity of \$500 payable quarterly during his natural life.

(11) Margaret Sanford, (widow of Charles Sanford, son of William A. Sanford, an annuity of \$150 payable quarterly during her natural life.

(12) Jacob Vanzandt Wyckoff and his wife Neola Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff)

and to the survivor of them, an annuity of \$650 payable quarterly during their natural lives.

(13) Charles S. Wyckoff (son of Sarah E. Wyckoff) an annuity of \$300 payable quarterly, during his natural life, and upon his death such annuity to be continued to his wife, Gladys Wyckoff, during her natural life.

(14) Mabel Wyckoff, (daughter of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during her natural life.

(15) Frank Wyckoff, (son of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during his natural life.

(16) John Henry Wyckoff and his wife Carrie Estelle Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff) an annuity of \$300 payable quarterly and to the survivor of them during their natural lives.

(17) Charles S. Miller and Harriet Miller his wife (son [fol. 167] and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$300 payable quarterly during their respective lives.

(18) Dr. James D. Miller (son of Annie Miller) an annuity of \$650 payable quarterly during his natural life, and upon his death such annuity to be continued to his wife Mona Miller during her natural life.

(19) Elizabeth Bates (daughter of Annie Miller) an annuity of \$400 payable quarterly during her natural life.

(20) Sarah F. Yard (daughter of Annie Miller) an annuity of \$300 payable quarterly during her natural life.

(21) Robert C. Miller and Frances Miller (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$1,000 payable quarterly during their natural lives.

(22) Daniel E. Sanford (son of Tylee Sanford) an annuity of \$300 payable quarterly during his natural life.

(23) Garrett T. Sanford and Emma Sanford (son and daughter-in-law of Tylee Sanford) and to the survivor of them, an annuity of \$1,200 payable quarterly during their natural lives.

(24) Margaret Irene Sanford (daughter-in-law of Tylee Sanford) an annuity of \$400 payable quarterly to be by

her used and applied for the benefit of herself and family as she may see fit, during her natural life, and upon her death to continue the payments of said annuity to her husband Frank A. Sanford, during his natural life.

(25) Henry P. Sanford and Viola Sanford (son and daughter-in-law of Tylee Sanford) and the survivor of them, an annuity of \$300 payable quarterly during their natural lives.

(26) Lizzie Henderson Sanford (daughter-in-law of Tylee Sanford) an annuity of \$500 payable quarterly, to be used and applied for the benefit of herself and family as she may see fit during her natural life, and upon her death [fol. 168] to continue the payment of said annuity to her children in equal shares during their respective minorities.

(27) Ollie Cross (daughter of Tylee Sanford) wife of Milton Cross an annuity of \$300 payable quarterly during her natural life.

(28) Elizabeth Adams (daughter of Tylee Sanford) wife of Eleigh Adams, an annuity of \$300 payable quarterly during her natural life.

(29) Elizabeth Sanford (widow of Tylee Sanford) an annuity of \$400 payable quarterly during her natural life.

(30) Louise Tilton, an annuity of \$500 payable quarterly during her natural life.

(31) James Billett, (valet to the party of the first part) an annuity of \$200 payable quarterly during his natural life.

(32) Eunice Stokes Cocks (daughter of Gertrude S. Cocks) an annuity of \$400 per annum, which sum shall be paid January 2, 1924, and on each January 2nd thereafter during the life of said Eunice Stokes Cocks to Gertrude S. Cocks, mother of said Eunice Stokes Cocks, to be applied for her benefit during her minority and thereafter to be paid directly to said Eunice Stokes Cocks during her natural life. During the minority of said Eunice Stokes Cocks receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the trustee with respect to such payments.

(33) Rowland E. Cocks, Jr., (son of Gertrude S. Cocks) an annuity of \$300 per annum, which sum shall be paid Jan-



of the said Sarita E. Barclay then living in equal shares, per stirpes and not per capita.

[fol. 171] "and after making such exceptions and reservations, the resultant remainder shall be held in trust by the trustee and its successors to collect and receive the interest, income and profits thereof and apply the net income to the use of the descendants of the said Sarita E. Barclay living at the time of her death, per stirpes and not per capita, during the natural life of Colville Herbert Sanford-Barclay, and upon his death the said resultant remainder shall be paid over to the descendants of the said Sarita E. Barclay then living, in equal shares, per stirpes and not per capita. In the event that said Sarita E. Barclay shall die leaving her no descendants her surviving, then to pay over the resultant remainder to the party of the first part should he be living, and if dead to distribute the same in equal shares among the descendants of the party of the first part, per stirpes and not per capita.

In making such payments and distribution to the former annuitants aforesaid or to the remaindermen above described, the Trustee is authorized to use and deliver in kind the assets held in the corpus of the said Sarita E. Barclay Trust, in whatever form it may be at that time invested.

To Have and to Hold the property described as the 'Frances G. Phipps Trust', upon Schedule C, hereto annexed, to the Trustee and its successors to collect and receive the interest, income and profits thereof and out of the said income during the natural life of Frances G. Phipps to pay the following annuities as hereinafter provided, namely to

(1) Emily A. Sanford, (the wife of the party of the first part) an annuity of \$17,000, payable quarterly during her natural life.

(2) Mary Elizabeth Sanford, an annuity of \$1,000, payable quarterly during her natural life.

(3) Delia Sanford, (daughter of Mary Elizabeth Sanford) an annuity of \$300 payable quarterly during her natural life.

(4) Sarah Elizabeth Wyckoff, (a sister of the party of the first part) an annuity of \$1,300 during her natural life.

(5) Anna Grace Naquin, (a daughter of Sarah Elizabeth Wyckoff) an annuity of \$300 payable quarterly during her

natural life, and should she die before the younger of her [fol. 172] two children Edward Clinton Harvey and Grace Elizabeth Harvey shall have attained the age of twenty-one years, the said annuity shall be continued for the benefit of said minor children or the survivor of them during their minority, the amount thereof to be paid to Sarah Elizabeth Wyckoff and Mabel Wyckoff jointly or severally for the support of said minors.

(6) Mary Anna Miller, (a sister of the party of the first part) an annuity of \$1,300 payable quarterly during her natural life.

(7) Frederick J. Sanford, a nephew of the party of the first part) and to his wife jointly, and to the survivor of them, an annuity of \$1,000 payable quarterly, for the purpose of aiding in the support of the mothers, sisters, and brothers of said Frederick J. Sanford; this annuity to terminate upon the death of the survivor of said Frederick J. Sanford and his wife.

(8) Mamie Crisp and Louis Crisp (daughter and son-in-law of William A. Sanford, a brother of the party of the first part) and to the survivor of them an annuity of \$500 payable quarterly to be used and applied for the benefit of their daughter Jeannette Crisp as long as she lives, and after her death the said annuity shall be paid the said Mamie Crisp and Louis Crisp, or the survivor of them during their natural lives without restriction or limitations as to its use or application. The receipt of said Mamie Crisp and, or, Louis Crisp for such payments shall be full acquittance and discharge of the Trustee with respect to such payments.

(9) Joseph A. Sanford, (a nephew of the party of the first part) an annuity of \$300 payable quarterly during his natural life.

(10) Jacob Horace Sanford, (a nephew of the party of the first part) an annuity of \$500 payable quarterly during his natural life.

(11) Margaret Sanford, (widow of Charles Sanford, son of William A. Sanford) an annuity of \$150 payable quarterly during her natural life.

[fol. 173] (12) Jacob Vanzandt Wyckoff and his wife Neola Wyckoff, (son and daughter-in-law of Sarah E.

Wyckoff) and to the survivor of them, an annuity of \$650 payable quarterly during their natural lives.

(13) Charles S. Wyckoff (son of Sarah E. Wyckoff) an annuity of \$300, payable quarterly, during his natural life, and upon his death such annuity to be continued to his wife, Gladys Wyckoff, during her natural life.

(14) Mabel Wyckoff, (daughter of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during her natural life.

(15) Frank Wyckoff, (son of Sarah E. Wyckoff) an annuity of \$300 payable quarterly during his natural life.

(16) John Henry Wyckoff and his wife Carrie Estelle Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff) an annuity of \$300 payable quarterly and to the survivor of them during their natural lives.

(17) Charles S. Miller and Harriet Miller his wife (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$300 payable quarterly during their respective lives.

(18) Dr. James D. Miller, (son of Annie Miller) an annuity of \$650 payable quarterly during his natural life, and upon his death such annuity to be continued to his wife Mona Miller during her natural life.

(19) Elizabeth Bates, (daughter of Annie Miller) an annuity of \$300 payable quarterly during her natural life.

(20) Sarah F. Yard, (daughter of Annie Miller) an annuity of \$400 payable quarterly during her natural life.

(21) Robert G. Miller and Frances Miller, (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$1,000 payable quarterly during their natural lives.

(22) Daniel E. Sanford, (son of Tylee Sanford) an annuity of \$400 payable quarterly during his natural life.

[fol. 174] (23) Garrett T. Sanford and Emma Sanford, (son and daughter-in-law of Tylee Sanford) and to the survivor of them, an annuity of \$1200 payable quarterly during their natural lives.

(24) Margaret Irene Sanford, (daughter-in-law of Tylee Sanford) an annuity of \$300 payable quarterly to be by her

used and applied for the benefit of herself and family as she may see fit, during her natural life, and upon her death to continue the payment of said annuity to her husband Frank A. Sanford, during his natural life.

(25) Henry P. Sanford and Viola Sanford, (son and daughter-in-law of Tylee Sanford) and the survivor of them, an annuity of \$300 payable quarterly during their natural lives.

(26) Lizzie Henderson Sanford, (daughter-in-law of Tylee Sanford) an annuity of \$500 payable quarterly, to be used and applied for the benefit of herself and family as she may see fit during her natural life, and upon her death to continue the payment of said annuity to her children in equal shares during their respective minorities.

(27) Ollie Cross, (daughter of Tylee Sanford) wife of Milton Cross, an annuity of \$300 payable quarterly during her natural life.

(28) Elizabeth Adams, (daughter of Tylee Sanford) wife of Eleigh Adams, an annuity of \$400 payable quarterly.

(29) Elizabeth Sanford, (widow of Tylee Sanford) an annuity of \$300 payable quarterly during her natural life.

(30) Louise Tilton, an annuity of \$500 payable quarterly during her natural life.

(31) James Billett, (valet to the party of the first part) an annuity of \$200 payable quarterly during his natural life.

(32) Eunice Stokes Cocks, (daughter of Gertrude S. Cocks) an annuity of \$300 per annum, which sum shall be paid January 2nd, 1924, and on each January 2nd thereafter during the life of said Eunice Stokes Cocks to Gertrude S. Cocks, mother of said Eunice Stokes Cocks, to be [fol. 175] applied for her benefit during her minority and thereafter to be paid directly to said Eunice Stokes Cocks during her natural life. During the minority of said Eunice Stokes Cocks receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the trustee with respect to such payments.

(33) Rowland E. Cocks, Jr., (son of Gertrude S. Cocks), an annuity of \$300 per annum, which sum shall be paid

uary 2, 1924, and on each January 2nd thereafter during the life of said Rowland E. Cocks, Jr., to Gertrude S. Cocks, mother of said Rowland E. Cocks, Jr., to be applied for his benefit during his minority and thereafter to be paid directly to said Rowland E. Cocks, Jr., during his natural life. During the minority of said Rowland E. Cocks, Jr., receipt [fol. 169] for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the trustee with respect to such payments.

(34) Reverend Frank R. Symmes and to Elizabeth J. Symmes his wife and to the survivor of them of Freehold, N. J., an annuity of \$300 per annum payable quarterly during their natural lives.

(35) Alfred Bird, (Secretary to the party of the first part) an annuity of \$650 payable quarterly during his natural life, or until such time as the party of the first part, or his wife, Emily A. Sanford shall notify the Trustee that said Alfred Bird is no longer in his or her employ, or is not rendering satisfactory service as such employee.

(36) Muriel Jane Bird (daughter of Alfred Bird) an annuity of \$300 payable quarterly during her natural life. Such annuity, however, is not to commence until the death of said Alfred Bird, nor unless said Alfred Bird was in the employ of the party of the first part, or his wife Emily A. Sanford at the time of said Alfred Bird's death, it being intended that said annuity shall be a continuation in a reduced amount of the annuity formerly payable to her father Alfred Bird.

(37) Sarah Elizabeth Wyckoff and Mabel Wyckoff, (a sister and niece of the party of the first part), and to the survivor of them, an annuity of \$200 payable quarterly, to be used and applied for the benefit of Clinton Harvey (son of Anna Grace Naquin) during his natural life or until he shall have attained the age of twenty-five years, and thereafter the said annuity shall be paid to said Clinton Harvey during his natural life. The receipt of said Sarah Elizabeth Wyckoff or Mabel Wyckoff for such payments as shall be made to them shall be full acquittance and discharge of the trustee with respect to such payments.

(38) Sarah Elizabeth Wyckoff and Mabel Wyckoff, (a sister and niece of the party of the first part), and to the



survivor of them, an annuity of \$200 payable quarterly, to be used and applied for the benefit of Grace Elizabeth Harvey (daughter of Anna Grace Naquin) during her [fol. 170] natural life or until she shall have attained the age of twenty-five years, and thereafter the said annuity shall be paid to the said Grace Elizabeth Harvey during her natural life. The receipt of said Sarah Elizabeth Wyckoff or Mabel Wyckoff for such payments as shall be made to them shall be full acquittance and discharge of the trustee with respect to such payments.

(39) Sanford Memorial Methodist Church of Englishtown, New Jersey, an annuity of \$100 per annum, which sum shall be paid January 2, 1924, and on each January 2 thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the library of the said Church. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance in discharge of the Trustee with respect to such payments.

And after payment of said annuities together with the expenses and commissions of the said Trustee to apply the residue of the net income to the use of Sarita E. Barclay during the time of her natural life. Upon the death of the said Sarita E. Barclay, there shall be excepted and reserved from the corpus of the trust fund theretofore held as the Sarita E. Barclay Trust:

(1) Such sums as in the unrestricted judgment and discretion of the Trustee may be necessary to purchase equivalent annuities for each of the persons then surviving to whom an annuity has been granted and made a prior charge against the income aforesaid, or in lieu thereof such sums, as the Trustee may deem necessary to commute and satisfy such equivalent annuities, full power and discretion being hereby vested in the Trustee to make such settlement or to effect such arrangement for the satisfaction of such annuities.

(2) The sum of \$50,000 should said Sarita E. Barclay be survived by her husband, Sir Colville Barclay, which sum the trustee is in that event directed to hold in trust and apply the net income to the use of the said Sir Colville Barclay during his natural life and upon his death to distribute the corpus of the said fund among the descendants

January 2, 1924, and on each January 2nd thereafter during the life of said Rowland E. Cocks, Jr., to Gertrude S. Cocks, mother of said Rowland E. Cocks, Jr., to be applied for his benefit during his minority and thereafter to be paid directly to said Rowland E. Cocks, Jr., during his natural life. During the minority of said Rowland E. Cocks, Jr., receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the trustee with respect to such payments.

(34) Reverend Frank R. Symmes and to Elizabeth J. Symmes his wife and to the survivor of them of Freehold, N. J., an annuity of \$350 per annum payable quarterly during their natural lives.

(35) Alfred Bird, (secretary to the party of the first part) an annuity of \$700 payable quarterly during his natural life, or until such time as the party of the first part, or his wife, Emily A. Sanford shall notify the Trustee that said Alfred Bird is no longer in his or her employ, or is not rendering satisfactory service as such employee.

(36) Muriel Jane Bird, (daughter of Alfred Bird) an annuity of \$350, payable quarterly during her natural life. Such annuity, however, is not to commence until the death of said Alfred Bird, nor unless said Alfred Bird was in the employ of the party of the first part, or his wife Emily A. Sanford at the time of said Alfred Bird's death, it being intended that said annuity shall be a continuation in a reduced amount of the annuity formerly payable to her father Alfred Bird.

(37) Sarah Elizabeth Wyckoff and Mabel Wyckoff, (a sister and niece of the party of the first part), and to the survivor of them, an annuity of \$150, payable quarterly, to be used and applied for the benefit of Clinton Harvey (son [fol. 176] of Anna Grace Naquin) during his natural life or until he shall have attained the age of twenty-five years, and thereafter the said annuity shall be paid to the said Clinton Harvey during his natural life. The receipt of said Sarah Elizabeth Wyckoff or Mabel Wyckoff for such payments as shall be made to them shall be full acquittance and discharge of the trustee with respect to such payments.

(38) Sarah Elizabeth Wyckoff and Mabel Wyckoff, (a sister and niece of the party of the first part), and to the

survivor of them, an annuity of \$150. payable quarterly, to be used and applied for the benefit of Grace Elizabeth Harvey (daughter of Anna Grace Naquin) during her natural life or until she shall have attained the age of twenty-five years, and thereafter the said annuity shall be paid to the said Grace Elizabeth Harvey during her natural life. The receipt of said Sarah Elizabeth Wyckoff or Mabel Wyckoff for such payments as shall be made to them shall be full acquittance and discharge of the trustee with respect to such payments.

(39) Sanford Memorial Methodist Church of Englishtown, New Jersey, an annuity of Two Hundred Dollars (\$200.) per annum, which sum shall be paid January 2, 1924, and on each January 2 thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the library of the said church. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance in discharge of the Trustee with respect to such payments.

And after payment of said annuities together with the expenses and commissions of the said Trustee to apply the residue of the net income to the use of Frances G. Phipps during the time of her natural life. Upon the death of said Frances G. Phipps there shall be excepted and reserved from the corpus of the trust fund theretofore held as the Frances G. Phipps Trust:

(1) Such sums as in the unrestricted judgment and discretion of the Trustee may be necessary to purchase equivalent annuities for each of the persons then surviving to whom an annuity has been granted and made a prior charge against the income aforesaid, or in lieu thereof such sums [fol. 177] as the Trustee may deem necessary to commute and satisfy such equivalent annuities full power and discretion being hereby vested in the Trustee to make such settlement or to effect such arrangement for the satisfaction of such annuities.

(2) The sum of \$50,000 should said Frances G. Phipps be survived by her husband, Eric Phipps, which sum the Trustee is in that event directed to hold in trust and apply the net income to the use of the said Eric Phipps during his natural life and upon his death to distribute the corpus of the said fund among the descendants of the said Frances G.

survivor of them, an annuity of \$700. payable quarterly during their natural lives.

(13) Charles S. Wyckoff (son of Sarah E. Wyckoff) an annuity of \$400. payable quarterly, during his natural life, and upon his death such annuity to be continued to his wife, Gladys Wyckoff, during her natural life.

(14) Mabel Wyckoff, (daughter of Sarah E. Wyckoff) an annuity of \$400. payable quarterly during her natural life.

● (15) Frank Wyckoff, (son of Sarah E. Wyckoff) an annuity of \$400. payable quarterly during his natural life.

(16) John Henry Wyckoff and his wife Carrie Estelle Wyckoff, (son and daughter-in-law of Sarah E. Wyckoff) an annuity of \$400. payable quarterly and to the survivor of them during their natural lives.

(17) Charles S. Miller and Harriet Miller his wife (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$400. payable quarterly during their respective lives.

(18) Dr. James D. Miller, (son of Annie Miller) an annuity of \$700. payable quarterly during his natural life, and upon his death such annuity to be continued to his wife Mona Miller during her natural life.

(19) Elizabeth Bates, (daughter of Annie Miller) an annuity of \$300. payable quarterly during her natural life.

[fol. 180] (20) Sarah F. Yard, (daughter of Annie Miller) an annuity of \$300. payable quarterly during her natural life.

(21) Robert C. Miller and Frances Miller (son and daughter-in-law of Annie Miller) and to the survivor of them, an annuity of \$1,000. payable quarterly during their natural lives.

(22) Daniel E. Sanford, (son of Tylee Sanford) an annuity of \$300. payable quarterly during his natural life.

(23) Garrett T. Sanford and Emma Sanford, (son and daughter-in-law of Tylee Sanford) and to the survivor of them, an annuity of \$1,100. payable quarterly during their natural lives.

(24) Margaret Irene Sanford, (daughter-in-law of Tylee Sanford) an annuity of \$300. payable quarterly to be by her used and applied for the benefit of herself and family as she

may see fit, during her natural life, and upon her death to continue the payment of said annuity to her husband Frank A. Sanford, during his natural life.

(25) Henry P. Sanford and Viola Sanford, (son and daughter-in-law of Tylee Sanford) and the survivor of them, an annuity of \$400. payable quarterly during their natural lives.

(26) Lizzie Henderson Sanford, (daughter-in-law of Tylee Sanford) an annuity of \$500. payable quarterly, to be used and applied for the benefit of herself and family as she may see fit during her natural life, and upon her death to continue the payment of said annuity to her children in equal shares during their respective minorities.

(27) Ollie Cross, (daughter of Tylee Sanford) wife of Milton Cross, an annuity of \$400. payable quarterly during her natural life.

(28) Elizabeth Adams, (daughter of Tylee Sanford) wife of Eleigh Adams, an annuity of \$300. payable quarterly during her natural life.

(29) Elizabeth Sanford, (widow of Tylee Sanford) an annuity of \$300. payable quarterly during her natural life.

[fol. 181] (30) Louise Tilton, an annuity of \$500. payable quarterly during her natural life.

(31) James Billett, (valet to the party of the first part) an annuity of \$200. payable quarterly during his natural life.

(32) Eunice Stokes Cocks (daughter of Gertrude S. Cocks) an annuity of \$300. per annum, which sum shall be paid January 2, 1924, and on each January 2nd thereafter during the life of said Eunice Stokes Cocks to Gertrude S. Cocks, mother of said Eunice Stokes Cocks, to be applied for her benefit during her minority and thereafter to be paid directly to said Eunice Stokes Cocks during her natural life. During the minority of said Eunice Stokes Cocks receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the trustee with respect to such payments..

(33) Rowland E. Cocks, Jr., (son of Gertrude S. Cocks) an annuity of \$400. per annum, which sum shall be paid January 2, 1924, and on each January 2nd thereafter during the



life of said Rowland E. Cocks, Jr., to Gertrude S. Cocks, mother of said Rowland E. Cocks, Jr., to be applied for his benefit during his minority and thereafter to be paid directly to said Rowland E. Cocks, Jr., during his natural life. During the minority of said Rowland E. Cocks, Jr., receipt for such payments signed by Gertrude S. Cocks shall be full acquittance and discharge of the Trustee with respect to such payments.

(34) Reverend Frank R. Symmes and to Elizabeth J. Symmes his wife and to the survivor of them of Freehold, N. J., an annuity of \$350. per annum payable quarterly during their natural lives.

(35) Alfred Bird, (secretary to the party of the first part) an annuity of \$650. payable quarterly during his natural life, or until such time as the party of the first part, or his wife Emily A. Sanford shall notify the Trustee that said Alfred Bird is no longer in his or her employ, or is not rendering satisfactory service as such employee.

(36) Muriel Jane Bird (daughter of Alfred Bird) an annuity of \$350. payable quarterly during her natural life. [fol. 182] Such "annuity, however, is not to commence until the death of said Alfred Bird, nor unless said Alfred Bird was in the employ of the party of the first part, or his wife, Emily A. Sanford at the time of said Alfred Bird's death, it being intended that said annuity shall be a continuation in a reduced amount of the annuity formerly payable to her father Alfred Bird.

(37) Sarah Elizabeth Wyckoff and Mabel Wyckoff, (a sister and niece of the party of the first part), and to the survivor of them, an annuity of \$150 payable quarterly, to be used and applied for the benefit of Clinton Harvey (son of Anna Grace Naquin) during his natural life or until he shall have attained the age of twenty-five years, and thereafter the said annuity shall be paid to the said Clinton Harvey during his natural life. The receipt of said Sarah Elizabeth Wyckoff or Mabel Wyckoff for such payments as shall be made to them shall be full acquittance and discharge of the trustee with respect to such payments.

(38) Sarah Elizabeth Wyckoff and Mabel Wyckoff, (a sister and niece of the party of the first part), and to the survivor of them, an annuity of \$150 payable quarterly, to be

used and applied for the benefit of Grace Elizabeth Harvey (daughter of Anna Grace Naquin) during her natural life or until she shall have attained the age of twenty-five years, and thereafter the said annuity shall be paid to the said Grace Elizabeth Harvey during her natural life. The receipt of said Sarah Elizabeth Wyckoff or Mabel Wyckoff for such payments as shall be made to them shall be full acquittance and discharge of the trustee with respect to such payments.

(39) Sanford Memorial Methodist Church of Englishtown, New Jersey, an annuity of \$200 per annum, which sum shall be paid January 2, 1924, and on each January 2 thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the library of the said church. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance in discharge of the Trustee with respect to such payments.

[fol. 183] And, after payment of said annuities together with the expenses and commissions of the said Trustee to apply the residue of the net income to the use of Herbert Sanford Ward during the time of his natural life. Upon the death of the said Herbert Sanford Ward there shall be excepted and reserved from the corpus of the trust fund theretofore held as the Herbert Sanford Ward Trust:

(1) Such sums as in the unrestricted judgment and discretion of the Trustee may be necessary to purchase equivalent annuities for each of the persons then surviving to whom an annuity has been granted and made a prior charge against the income aforesaid, or in lieu thereof such sums as the Trustee may deem necessary to commute and satisfy such equivalent annuities full power and discretion being hereby vested in the Trustee to make such settlement or to effect such arrangement for the satisfaction of such annuities.

(2) The sum of \$50,000 should said Herbert Sanford Ward be survived by his wife, Joyce Ward, which sum the Trustee is in that event directed to hold in trust to apply the net income to the use of the said Joyce Ward during her natural life and upon her death to distribute the corpus of the said fund among the descendants of the said Herbert

Sanford Ward then living in equal shares, per stirpes and not per capita.

and after making such exceptions and reservations, the resultant remainder shall be held in trust by the trustee and its successors to collect and receive the interest, income and profits thereof and apply the net income to the use of the descendants of the said Herbert Sanford Ward living at the time of his death, per stirpes and not per capita, during the natural life of Colville Herbert Sanford-Barclay, and upon his death the said resultant remainder shall be paid over to the descendants of the said Herbert Sanford Ward then living, in equal shares, per stirpes and not per capita. In the event that said Herbert Sanford Ward shall die leaving him no descendants him surviving, then to pay over the resultant remainder to the party of the first part should he be living, and if dead to distribute the same in equal shares among the descendants of the party of the first part, per stirpes and not per capita.

In making such payments and distribution to the former annuitants aforesaid or to the remaindermen above described, the Trustee is authorized to use and deliver in kind [fol. 184] the assets held in the corpus of the said Herbert Sanford Ward Trust, in whatever form it may be at that time invested.

Provided Always Nevertheless that as to each and every trust created hereunder the following provisions shall apply and govern:

1. It shall be lawful for the Trustee to continue to hold any investment, security or other property hereby granted or hereafter added to the trust estate unless the Trustee be directed in writing by the party of the first part to dispose of the same. Nevertheless, the Trustee is authorized to dispose of any investment, security or other property at public or private sale, or by exchange of securities, without direction from the party of the first part, but the Trustee shall not be liable for its failure to dispose of any such investment unless it be directed by the party of the first part to make such change of investment. The Trustee shall be protected with respect to all changes of investments by sale, exchange or reinvestment when its action has been taken pursuant to the written direction of the party of the first part, it being

understood and agreed that both investments and reinvestments hereunder may be made in securities not permitted by law as trust investments, if such investments or reinvestments are made pursuant to the direction of the party of the first part.

Either with or without the written direction of the party of the first part, the Trustee may extend an investment which may become due, consent to the reorganization or consolidation of any corporation or sale to any other corporation or person of the property of any corporation, the stocks, bonds, or other securities of which are at the time held by said Trustee, and likewise either with or without the written direction of the party of the first part, the Trustee may make exchanges of securities and do any act with reference thereto which the Trustee may deem necessary, proper or expedient, including the payment of moneys to enable the said Trustee to obtain the benefit of such reorganization, consolidation or sale of such stocks, bonds or other securities held by said Trustee, and to exercise any option for conversion or additional subscription extended by any such corporation, or in respect to any such stocks, bonds or other securities, and, either with or without such direction from the party of the first part, to make such conversions and subscriptions and to make any necessary payments therefor, and to hold such new securities in said trust without any liability on the part of the Trustee for any act by it taken in good faith, pursuant to the power to it herein granted.

[fol. 185] During the lifetime of the party of the first part, the Trustee may execute full and unlimited proxies to exercise the voting powers upon any stock or securities, forming a part of the trust estates, to the party of the first part, or to such person or persons as the party of the first part may direct. After the death of the party of the first part, the Trustee may give such proxies to such person or persons as it in its discretion may select. The Trustee is authorized to continue any investment of which the Trust estates may consist at the time of the death of the party of the first part and after the death of the party of the first part the Trustee may as to each and every such investments participate in reorganizations, consolidations, or exchanges pursuant to the refinancing of corporations whose securities form a part of the trust estates, applying if the Trustee deems it advisable,

cash out of principal account for such purpose, and the Trustee may continue to hold the new securities issuable to it as the result of such participation. Except as to participation in such reorganizations, consolidations and exchanges aforesaid, the Trustee after the death of the party of the first part shall make all reinvestments in such property and securities as are by the law of New York legal investments for Trustees.

The said Trustee shall be under no liability whatsoever for any loss which may arise from the exercise by the Trustee or its failure to exercise any of the powers herein contained.

2. The party of the first part may either in his lifetime or by last will and testament add to the property constituting the corpus of the respective trusts or of any of them such other property as he may from time to time transfer to the Trustee for that purpose and all such property so transferred in his lifetime shall be designated and described by suitable description thereof indicating the distribution of such property among the respective trusts over the signature of the party of the first part and shall thereupon become subject to all the trusts, powers and limitations hereinbefore expressed with regard to property constituting the respective trusts to which the same are to be added.

3. All income herein required to be distributed and paid over by the Trustee shall be distributed in quarter yearly payments on the first day of January, April, July and October in each year at which time the annuity payments shall likewise be made, except in those cases where a different date of payment is expressly described in the foregoing clauses specifically providing for such annuity payments.

[fol. 186] 4. The Trustee shall receive in full for its compensation for acting as Trustee of the trusts herein created in addition to its necessary expenses, a commission at the rate of One per cent (1%) on the amount of all income received by it and a commission of one-half of one per cent ( $\frac{1}{2}$  of 1%) on each distribution or other payment of capital.

5. The Trustee shall not be responsible for any diminution of the trust estates resulting from depreciation of securities or property in which it shall have been invested in good faith, and the Trustee shall not be responsible for



mistakes or errors in judgment, but shall be responsible only for fraud or willful misconduct of the Trustee, its officers and agents.

6. With respect to each and every annuity hereinbefore recited to be paid for the benefit of any person other than the person to whom the same shall be payable the Trustee shall be under no duty whatsoever to see the application thereof by any person to whom such annuity is directed to be paid hereby and the receipt of the latter shall be full and ample protection to the Trustee for all purposes hereunder.

7. No sums payable to annuitants shall accrue in favor of said annuitants until the actual date required for their payment.

8. The party of the first part however reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the Laws of the State of New York and filed with the Trustee; but this right of modification, however, shall in no way be deemed or construed to include any rights or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument.

In all other respects except as modified by this Supplemental Indenture and the Supplemental Indentures hereinbefore referred to, the said Indenture of December 24, 1913 is hereby reaffirmed and ratified especially including the right of the party of the first part to modify any or all of the trusts originally created or modified by said Supplemental Indentures aforesaid.

In Witness Whereof the party of the first part has hereunto set his hand and seal and the party of the second part [fol. 187] has caused its corporate seal to be affixed and these presents to be signed by its Vice-President the day and year first above written.

C. H. Sanford (L. S.). Guaranty Trust Company  
of New York, by F. J. H. Sutton, Vice-President.  
(Seal)

Attest: C. M. Schmidt, Ass't. Secretary.

**STATE OF NEW YORK,**  
**County of New York, ss:**

On the 21st day of December, in the year One thousand nine hundred and twenty-three, before me personally came Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

James L. Conway, Notary Public, New York County.  
 New York County Clerk's No. 558. New York  
 County Register's No. 4496. Certificate filed in  
 Bronx County. Bronx County Clerk's No. 42.  
 Bronx County Register's No. 206. Commission  
 expires March 30, 1924. (Seal.)

**[fol. 188] STATE OF NEW YORK,**  
**County of New York, ss:**

On the 21st day of December, in the year One thousand nine hundred and twenty-three, before me personally came Frederick J. H. Sutton, to me known, who, being by me duly sworn, did depose and say: that he resides in New York City, New York, and is a Vice-President of Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

James L. Conway, Notary Public, New York County.  
 New York County Clerk's No. 558. New York  
 County Register's No. 4496. Certificate filed in  
 Bronx County. Bronx County Clerk's No. 42.  
 Bronx County Register's No. 206. Commission  
 expires March 30, 1924. (Seal.)

**[fol. 189] COLVILLE HERBERT SANFORD-BARCLAY TRUST**

**SCHEDULE "A"**

\$155,000. par value Central Argentine Railway Co. Con-  
 solidated Ord. Stock (31,000 shares no  
 par value, carried at £1 for conveni-  
 ence).

3,000. " " Chicago, Milwaukee and St. Paul 4's,  
 1934.

## SCHEDULE "A"—Continued

\$2,000.	par value	Chicago, Milwaukee and Puget Sound 4's, 1949.
5,000.	" "	Union Pacific 1st Lien and Refunding 4's 2008.
9,000.	" "	Central Argentine Railway Ltd. 10 yr. 6's 1927.
400.	" "	U. S. A. Second Liberty Loan 4 $\frac{1}{4}$ 's 1942.
1,000.	" "	Chesapeake & Ohio Equipment Trust 6 $\frac{1}{2}$ 's 1932.
1,000.	" "	City of Bordeaux External Loan 6's 1934.
2,500.	" "	City of Lyons External Loan 6's 1934.
1,500.	" "	City of Marseilles External Loan 6's 1934.
6,000.	" "	Government of Argentine Nation 7's 1927.
17,000.	" "	United Kingdom of Great Britain and Ireland 20 yr. 5 $\frac{1}{2}$ 's—1937.
11,900.	" "	U. S. A. Treasury 4 $\frac{3}{4}$ 's 1926 Series "A".

\$215,300.

Total.

C. H. S.

F. J. H. S.

[fol. 190]

SARITA E. BARCLAY TRUST

## SCHEDULE "B"

\$92,500.00	Anglo Argentine Tramways Co. Ltd. 4% Deb. Stock (@ £ 5 par)
17,500.00	Anglo Argentine Tramways Co. Ltd. 5% Deb. Stock (@ £ 5 par)
18,166.67	Argentine Republic 4's, 1961
83,000.00	Baltimore & Ohio 4's, 1959
16,666.66	Brazil Northeastern 1st Debenture Stock
132,000.00	Central Argentine Railway Co. Ltd. 6's, 1927
835,000.00	Central Argentine Railway Co. Ltd. Cons. Ordinary Stk. (no par)
41,000.00	Central Arkansas & Eastern 1st 5's, 1940
8,333.34	Chaplin, Milne, Grenfell & Co. Preferred Stock (@ £ 10 par)
33,000.00	Chicago, Milwaukee & St. Paul 4's, 1934.

## SCHEDULE "B"—Continued

## Par Value

\$20,000.00	Chicago, Rock Island & Pacific 4's, 1934
80,500.00	City of Bordeaux 6's, 1934
58,500.00	City of Lyons, 6's, 1934
62,000.00	City of Marseilles 6's, 1934
127,500.00	City of Montevideo 5's, 1939
16,000.00	Colorado & Southern 4's, 1929
1,700.00	Freehold Trust Company, C/S (@ \$100. par)
20,000.00	Government of French Republic 8's, 1945
15,000.00	Guaranty Trust Company of New York, C/S @ \$100. par.
3,300.00	J. G. White Company, Preferred
20,000.00	Kansas City Southern 5's, 1950
32,000.00	Kingdom of Belgium 7½'s, 1945
17,000.00	Lake Shore & Michigan Southern 4's, 1931
83,000.00	Lake Shore Electric Railway 5's, 1933
66,700.00	Lanman & Kemp Inc., Preferred (@ \$100. par)
3,400.00	Lanman & Kemp Inc., Common (@ \$100. par)
4,000.00	New York Telephone 4½'s, 1939
9,500.00	Oriental Republic of Uruguay 3½'s
20,000.00	Rio Grande Western 4's, 1939
20,000.00	St. Louis, San Francisco 4's, 1950
20,000.00	St. Louis Southwestern 4's, 1989
83,000.00	St. Louis Southwestern 5's, 1952
586,666.66	Samuel B. Hale Company, Ltd. C/S (@ \$440. par or 1000 pesos)

[fol. 191]

100,000.00	Southern Railway 4's, 1956
33,000.00	Stevensville North & South Texas 1st 5's, 1940
8,500.00	Underground Electric Railways Co. of Lon- don Ltd. 4½'s, 1933
3,000.00	Government of Argentine Nation 7's, 1927
64,000.00	U. S. of A. Treasury 4¼'s 1952
17,700.00	U. S. of A. Treasury 4¾'s 1925
140,000.00	U. S. of A. Treasury 4¾'s 1926 Series "A"

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 \$3,013,133.33—Total

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 1,434.64—Cash

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 \$3,014,567.97—Grand Total.

C. H. S.

F. J. H. S.

[fol. 192]

## FRANCES G. PHIPPS TRUST

## SCHEDULE "C"

## Par Value

\$92,500.00	Anglo Argentine Tramways Co. Ltd. 4% Deb. Stock (@ £5 par)
17,500.00	Anglo Argentine Tramways Co. Ltd. 5% Deb. Stock (@ £5 par)
18,166.66	Argentine Republic 4's, 1961
83,000.00	Baltimore & Ohio 4's, 1959
16,666.67	Brazil Northeastern 1st Debenture Stock
132,000.00	Central Argentine Railway Co. Ltd., 6's, 1927
835,000.00	Central Argentine Railway Co. Ltd., Cons. Ordinary Stock
41,000.00	Central Arkansas & Eastern 1st 5's, 1940
8,333.33	Chaplin, Milne, Grenfell & Co. Preferred Stock (@ £10 par)
33,000.00	Chicago, Milwaukee & St. Paul 4's, 1934
20,000.00	Chicago, Rock Island & Pacific 4's, 1934
80,500.00	City of Bordeaux 6's, 1934
58,500.00	City of Lyons 6's, 1934
62,000.00	City of Marseilles 6's, 1934
127,500.00	City of Montevideo 5's, 1939
16,000.00	Colorado & Southern 4's, 1929
1,700.00	Freehold Trust Company, (C/S) @ (\$100 par)
20,000.00	Government of French Republic 8's, 1945
15,000.00	Guaranty Trust Company of New York C/S @ (\$100 par)
3,300.00	J. G. White Company, Preferred
20,000.00	Kansas City Southern 5's, 1950
32,000.00	Kingdom of Belgium 7½'s, 1945
17,000.00	Lake Shore & Michigan Southern 4's, 1931
83,000.00	Lake Shore Electric Railway 5's, 1933
66,700.00	Lanman & Kemp Inc., Preferred (@ \$100 par)
3,400.00	Lanman & Kemp Inc., Common (@ \$100 par)
4,000.00	New York Telephone 4½'s, 1939
9,500.00	Oriental Republic of Uruguay 3½'s
20,000.00	Rio Grande Western 4's, 1939
20,000.00	St. Louis, San Francisco 4's, 1950
20,000.00	St. Louis Southwestern 4's, 1989
83,000.00	St. Louis Southwestern 5's, 1952



## SCHEDULE "C"—Continued

## Par Value

\$586,666.67 Samuel B. Hale Co., Ltd. C/S (@ \$440 par  
or 1,000 pesos)

[fol. 193]

100,000.00 Southern Railway 4's, 1956  
33,000.00 Stevensville North & South Texas 1st 5's,  
1940  
8,500.00 Underground Electric Railways Co. of Lon-  
don Ltd. 4½'s, 1933  
3,000.00 Government of Argentine Nation 7's, 1927  
64,000.00 U. S. A. Treasury 4¼'s, 1952  
17,700.00 U. S. A. Treasury 4¾'s, 1925  
140,000.00 U. S. A. Treasury 4¾'s, 1926

\$3,013,133.33—Total

1,473.93—Cash

\$3,014,607.26—Grand Total

C. H. S.

F. J. H. S.

[fol. 194]

HERBERT SANFORD WARD TRUST

## SCHEDULE "D"

\$92,500.00 Anglo Argentine Tramway Co. Ltd. 4% Deb.  
Stock (£5 par)  
17,500.00 Anglo Argentine Tramway Co. Ltd. 5% Deb.  
Stock (£5 par)  
18,166.67 Argentine Republic 4's, 1961  
83,000.00 Baltimore & Ohio 4's, 1959  
16,666.67 Brazil Northeastern 1st Debenture Stock  
132,000.00 Central Argentine Railway Co. Ltd. 6's, 1927  
835,000.00 Central Argentine Railway Co. Ltd. Cons.  
Ordinary Stock  
41,000.00 Central Arkansas & Eastern 1st 5's, 1940  
8,333.33 Chaplin, Milne, Grenfell & Co. Pfd. Stock  
(£10 par)  
33,000.00 Chicago, Milwaukee & St. Paul 4's, 1934  
20,000.00 Chicago, Rock Island & Pacific 4's, 1934  
80,500.00 City of Bordeaux 6's, 1934  
58,500.00 City of Lyons 6's, 1934  
62,000.00 City of Marseilles 6's, 1934

## SCHEDULE "D"—Continued

## Par Value

\$127,500.00	City of Montevideo 5's, 1939
16,000.00	Colorado & Southern 4's, 1929
1,700.00	Freehold Trust Company Capital Stock (\$100 par)
20,000.00	Government of French Republic 8's, 1945
15,000.00	Guaranty Trust Company of New York Capital Stock (\$100 par)
3,300.00	J. G. White Company, preferred
20,000.00	Kansas City Southern 5's, 1950
32,000.00	Kingdom of Belgium 7½'s, 1945
17,000.00	Lake Shore & Michigan Southern 4's, 1931
83,000.00	Lake Shore Electric Railway 5's, 1933
66,700.00	Lanman & Kemp, Inc. Preferred (\$100 par)
3,400.00	Lanman & Kemp, Inc. Common (\$100 par)
4,000.00	New York Telephone 4½'s, 1939
9,500.00	Oriental Republic of Uruguay 3½'s
20,000.00	Rio Grande Western 4's, 1939
20,000.00	St. Louis, San Francisco 4's, 1950
20,000.00	St. Louis, Southwestern 4's, 1989
83,000.00	St. Louis Southwestern 5's, 1952
586,666.67	Samuel B. Hale Company, Ltd. C/S (\$440 par or 1,000 pesos)

[fol. 195]

100,000.00	Southern Railway 4's, 1956
33,000.00	Stevensville North & South Texas 1st 5's, 1940
8,500.00	Underground Electric Railways Co. of London, Ltd. 4½'s 1933
3,000.00	Government of Argentine Nation 7's, 1927
64,000.00	U. S. of A. Treasury 4¼'s 1952
17,700.00	U. S. of A. Treasury 4¾'s 1925
140,000.00	U. S. of A. Treasury 4¾'s 1926 Series "A"

\$3,013,133.34—Total  
2,804.99—Cash

\$3,015,938.33—Grand Total

C. H. S.

F. J. H. S.

[fol. 196] This supplemental Indenture, made the 10th day of March in the year one thousand nine hundred and twenty-

[fol. 201] This Supplemental Indenture made the 21st day of August in the year one thousand nine hundred and twenty-four, between Charles Henry Sanford, of Freehold, Monmouth County, State of New Jersey, party of the first part, and Guaranty Trust Company of New York (hereinafter for convenience termed the "Trustee"), a corporation organized and existing under the laws of the State of New York, with its principal office and place of business at No. 140 Broadway, New York, N. Y.

Witnesseth, That

Whereas by Indenture dated the 24th day of December, 1913, between the parties hereto, the party of the first part did create various trusts in property, of which the party of the second part was made Trustee, and

Whereas Indentures supplemental thereto have been executed by the said parties, the last being dated March 10, 1924, by which Supplemental Indentures (which together with the Indenture of December 24, 1913 are hereinafter for convenience termed the "Trust Indentures") additions to the trusts created by the Indenture of December 24, 1913 have been made by the party of the first part, modifications have been made with respect to such trusts pursuant to the right reserved in the party of the first part by the terms of the Trust Indentures, and,

Whereas the party of the first part desires to make certain further modifications pursuant to the power reserved to him,

Now, Therefore, pursuant to the power reserved to the party of the first part by the aforesaid Trust Indentures the party of the first part by this Supplemental Indenture does hereby ratify and hereby confirm his previous conveyances to the Trustee of the property respectively described in the said Trust Indentures. Said Trust Indentures respectively describe the present corpus and principal of the four trusts respectively created and for convenience herein and hereafter described as "Colville Herbert Sanford Barclay Trust", "Sarita E. Barclay Trust", "Frances G. Phipps Trust" and "Herbert Sanford Ward Trust", and the party of the first part does hereby ratify each and every act of the Trustee heretofore taken with respect to the investments in said Trust Indentures described, and with respect to all other acts of the Trustee pursuant to the said

Trust Indentures. The Terms and conditions upon which [fol. 202] the property was granted, bargained, sold, assigned, transferred and set over unto the Trustee are hereby modified, as follows:

1. That pursuant to the terms of the "Sarita E. Barclay Trust" the annuity provided thereunder as follows:

"(39) Sanford Memorial Methodist Church of English-town, New Jersey, an annuity of Five Hundred (\$500) Dollars per annum, which sum shall be paid January 2, 1925, and on each January 2 thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the said Church and the Library annexed thereto. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance and discharge of the Trustee with respect to such payments",

is hereby revoked and in its place and stead the following annuity shall be payable out of the income of said "Sarita E. Barclay Trust", to wit:

"(39) Sanford Memorial Methodist Church of English-town, New Jersey, an annuity of Six Hundred (\$600) Dollars per annum, which sum shall be paid October 1st, 1924, and quarterly thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the said Church and the Library annexed thereto. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance and discharge of the Trustee with respect to such payments."

2. That pursuant to the terms of the "Frances G. Phipps Trust" the annuity provided thereunder as follows:

"(39) Sanford Memorial Methodist Church of English-town, New Jersey, an annuity of Five Hundred (\$500) Dollars per annum, which sum shall be paid January 2, 1925, and on each January 2 thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the said Church and the Library annexed thereto. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance and discharge of the Trustee with respect to such payments",

four, between Charles Henry Sanford, of Freehold, Monmouth County, State of New Jersey, party of the first part, and Guaranty Trust Company of New York (hereinafter for convenience termed the "Trustee"), a corporation organized and existing under the laws of the State of New York, with its principal office and place of business at No. 140 Broadway, New York, N. Y.

Witnesseth, that Whereas by indenture dated the 24th day of December, 1913, between the parties hereto, the party of the first part did create various trusts in property, of which the party of the second part was made trustee, and

Whereas indentures supplemental thereto have been executed by the said parties, the last being dated December 21, 1923, by which supplemental indentures (which, together with the indenture of December 24, 1913, are hereinafter for convenience termed the "trust indentures") additions to the trust created by the indenture of December 24, 1913 have been made by the party of the first part, modifications have been made with respect to such trusts pursuant to the right reserved in the party of the first part by the terms of the trust indentures, and

Whereas the party of the first part desires to make certain further modifications pursuant to the power reserved to him.

Now Therefore, pursuant to the power reserved to the party of the first part by the aforesaid trust indentures, the party of the first part by this supplemental indenture does hereby ratify and hereby confirm his previous conveyances to the trustee of the property respectively described in the said trust indentures. Said trust indentures respectively describe the present corpus and principal of the four trusts respectively created and for convenience herein and hereafter described as "Colville Herbert Sanford Barclay Trust", "Sarita E. Barclay Trust", "Frances G. Phipps Trust" and "Herbert Sanford Ward Trust", and the party of the first part does hereby ratify each and every act of the trustee heretofore taken with respect to the investments in said trust indentures described and with respect to all other acts of the trustee pursuant to the said trust indentures. The terms and conditions upon which the property was [fol. 197] granted, bargained, sold, assigned, transferred and set over unto the trustee are hereby modified as follows:



1. That pursuant to the terms of the "Sarita E. Barclay Trust" the annuity provided thereunder as follows:

"(39) Sanford Memorial Methodist Church of English-town, New Jersey, an annuity of \$100 per annum, which sum shall be paid January 2, 1924, and on each January 2 thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the library of the said Church. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance in discharge of the Trustee with respect to such payments."

is hereby revoked and in its place and stead the following annuity shall be payable out of the income of the said "Sarita E. Barclay Trust", to wit,—

"(39) Sanford Memorial Methodist Church of English-town, New Jersey, an annuity of \$500 per annum which sum shall be paid January 2, 1925 and on each January 2 thereafter during the continuance of this trust to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the said Church and the library annexed thereto. Receipt for such payments signed by an officer of the Freehold Trust Company shall be full acquittance and discharge of the trustee with respect to such payments."

2. That pursuant to the terms of the "Frances G. Phipps Trust" the annuity provided thereunder as follows:

"(39) Sanford Memorial Methodist Church of English-town, New Jersey, an annuity of Two Hundred Dollars (\$200) per annum, which sum shall be paid, January 2, 1924, and on each January 2 thereafter, during the continuance of this Trust, to the Freehold Trust Company, of Freehold, New Jersey, to be used for the support of the library of the said Church. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance in discharge of the Trustee with respect to such payments."

[fol. 198] is hereby revoked and in its place and stead the following annuity shall be payable out of the income of the said "Frances G. Phipps Trust", to wit,—

"(39) Sanford Memorial Methodist Church of English-town, New Jersey, an annuity of \$500 per annum which sum

shall be paid January 2nd, 1925, and on each January 2 thereafter during the continuance of this trust to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the said Church and the library annexed thereto. Receipt for such payments signed by an officer of the Freehold Trust Company shall be full acquittance and discharge of the Trustee with respect to such payments."

3. That pursuant to the terms of the "Herbert Sanford Ward Trust" the annuity provided thereunder as follows:

"(39) Sanford Memorial Methodist Church of English-town, New Jersey, an annuity of \$200, per annum, which sum shall be paid January 2, 1924, and on each January 2 thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the library of the said Church. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance in discharge of the Trustee with respect to such payments."

is hereby revoked and in its place and stead the following annuity shall be payable out of the income of the said "Herbert Sanford Ward Trust", to wit,—

"(39) Sanford Memorial Methodist Church of English-town, New Jersey, an annuity of \$500 per annum, which sum shall be paid January 2, 1925, and on each January 2 thereafter during the continuance of this trust to the Freehold Trust Company of Freehold, New Jersey to be used for the support of the said Church and the library annexed thereto. Receipt for such payments signed by an officer of the Freehold Trust Company shall be full acquittance and discharge of the Trustee with respect to such payments."

[fol. 199] In all other respects except as modified by this supplemental indenture the trust indentures hereinbefore referred to are hereby re-affirmed and ratified, especially including the right of the party of the first part to modify any or all of the trusts created by the trust indentures aforesaid.

In Witness Whereof the party of the first part has hereunto set his hand and seal and the party of the second part has caused its corporate seal to be affixed and these presents

to be signed by its vice-president the day and year first above written.

C. H. Sanford, Guaranty Trust Company of New York, F. J. H. Sutton, Vice President.

(Seal.)

Attest: E. P. Davis, Asst. Secretary.

STATE OF NEW YORK,  
County of New York, ss:

On this 10th day of March 1924, before me personally appeared Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

Richard H. Parks, Notary Public, Queens County No. 413. Certificate filed in New York County No. 106. New York County Register's No. 4119. Certificate filed in King's County No. 60. King's County Register's No. 4051. Commission expires March 30, 1924.

(Seal.)

[fol. 200] STATE OF NEW YORK,  
County of New York, ss:

On this 10th day of March 1924, before me personally came F. J. H. Sutton to me known, who being by me duly sworn did depose and say that he resides in New York City, New York; that he is a Vice-President of the Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Richard H. Parks, Notary Public, Queens County No. 413. Certificate filed in New York County No. 106. New York County Register's No. 4119. Certificate filed in King's County No. 60. King's County Register's No. 4051. Commission expires March 30, 1924.

(Seal.)

[fol. 203] is hereby revoked and in its place and stead the following annuity shall be payable out of the income of the said "Frances G. Phipps Trust", to wit:

"(39) Sanford Memorial Methodist Church of Englishtown, New Jersey, an annuity of Seven Hundred (\$700) Dollars per annum, which sum shall be paid October 1st, 1924 and quarterly thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the said Church and the Library annexed thereto. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance and discharge of the Trustee with respect to such payments."

3. That pursuant to the terms of the "Herbert Sanford Ward Trust" the annuity provided thereunder as follows:

"(39) Sanford Memorial Methodist Church of Englishtown, New Jersey, an annuity of Five Hundred (\$500) Dollars per annum, which sum shall be paid January 2, 1925, and on each January 2 thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the said Church and the Library annexed thereto. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance and discharge of the Trustee with respect to such payments",

is hereby revoked and in its place and stead the following annuity shall be payable out of the income of the said "Herbert Sanford Ward Trust", to wit:

"(39) Sanford Memorial Methodist Church of Englishtown, New Jersey, an annuity of Seven Hundred (\$700) Dollars per annum, which sum shall be paid October 1, 1924, and quarterly thereafter, during the continuance of this Trust, to the Freehold Trust Company of Freehold, New Jersey, to be used for the support of the said Church and Library annexed thereto. Receipt for such payments, signed by an officer of the Freehold Trust Company, shall be full acquittance and discharge of the Trustee with respect to such payments."

[fol. 204]. 4. That pursuant to the terms of the "Sarita E. Barclay Trust" the annuity provided thereunder as follows:

"(1) Emily A. Sanford (the wife of the party of the first part) an annuity of \$17,000, payable quarterly during her natural life",

is hereby revoked and in its place and stead the following annuity shall be payable out of the income of the said "Sarita E. Barclay Trust", to wit:

"(1) Emily A. Sanford (the wife of the party of the first part) an annuity of \$17,000, the payment thereof to be suspended until the date of death of the party of the first part, and thereafter to be payable quarterly during her natural life; the first of such payments to be made on the quarterly date next following the date of death of the party of the first part."

5. That pursuant to the terms of the "Frances G. Phipps Trust" the annuity provided thereunder as follows:

"(1) Emily A. Sanford (the wife of the party of the first part) an annuity of \$17,000, payable quarterly during her natural life",

is hereby revoked and in its place and stead the following annuity shall be payable out of the income of the said "Frances G. Phipps Trust", to wit:

"(1) Emily A. Sanford (the wife of the party of the first part) an annuity of \$17,000, the payment thereof to be suspended until the date of death of the party of the first part, and thereafter to be payable quarterly during her natural life, the first of such payments to be made on the quarterly date next following the date of death of the party of the first part."

6. That pursuant to the terms of the "Herbert Sanford Ward Trust" the annuity provided thereunder as follows:

"(1) Emily A. Sanford (the wife of the party of the first part) an annuity of \$16,000, payable quarterly during her natural life",

is hereby revoked and in its place and stead the following [fol. 205] annuity shall be payable out of the income of the said "Herbert Sanford Ward Trust," to wit:

"(1) Emily A. Sanford (the wife of the party of the first part) an annuity of \$16,000, the payment thereof to be suspended until the date of death of the party of the first



part, and thereafter to be payable quarterly during her natural life, the first of such payments to be made on the quarterly date next following the date of death of the party of the first part."

7. That out of the income of the "Sarita E. Barclay Trust" in addition to the annuities heretofore provided for the following annuity shall also be payable:

"(40) Frederick E. Anderson of Freehold, New Jersey, an annuity of \$200, payable quarterly during his natural life and upon his death such annuity to be continued to his daughter Lillian Anderson during her natural life.

8. That out of the income of the "Frances G. Phipps Trust" in addition to the annuities heretofore provided for, the following annuity shall also be payable:

"(40) Frederick E. Anderson of Freehold, New Jersey, an annuity of \$150, payable quarterly during his natural life and upon his death such annuity to be continued to his daughter Lillian Anderson during her natural life."

9. That out of the income of the "Herbert Sanford Warl Trust" in addition to the annuities heretofore provided for, the following annuity shall also be payable:

"(40) Frederick E. Anderson of Freehold, New Jersey, an annuity of \$150, payable quarterly during his natural life and upon his death such annuity to be continued to his daughter Lillian Anderson during her natural life."

10. That the terms of the said Trust Indentures applying to and governing each trust created thereunder, to wit:

"1. It shall be lawful for the Trustee to continue to hold any investment, security or other property hereby granted or hereafter added to the trust estate unless the Trustee be [fol. 206] directed in writing by the party of the first part to dispose of the same. Nevertheless, the Trustee is authorized to dispose of any investment, security or other property at public or private sale, or by exchange of securities, without direction from the party of the first part, but the Trustee shall not be liable for its failure to dispose of any such investment unless it be directed by the party of the first part to make such change of investment. The Trustee shall be protected with respect to all changes of investments by sale, exchange or reinvestment when its action has been

taken pursuant to the written direction of the party of the first part, it being understood and agreed that both investments and reinvestments hereunder may be made in securities not permitted by law as trust investments, if such investments or reinvestments are made pursuant to the direction of the party of the first part.

Either with or without the written direction of the party of the first part, the Trustee may extend an investment which may become due, consent to the reorganization or consolidation of any corporation or sale to any other corporation or person of the property of any corporation, the stocks, bonds, or other securities of which are at the time held by said Trustee, and likewise either with or without the written direction of the party of the first part, the Trustee may make exchanges of securities and do any act with reference thereto which the Trustee may deem necessary, proper or expedient, including the payment of moneys to enable the said Trustee to obtain the benefit of such reorganization, consolidation or sale of such stocks, bonds or other securities held by said Trustee, and to exercise any option for conversion or additional subscription extended by any such corporation, or in respect to any such stocks, bonds or other securities, and, either with or without such direction from the party of the first part, to make such conversions and subscriptions and to make any necessary payments therefor, and to hold such new securities in said trust without any liability on the part of the Trustee for any act by it taken in good faith, pursuant to the power to it herein granted.

During the lifetime of the party of the first part, the Trustee may execute full and unlimited proxies to exercise the voting powers upon any stock or securities, forming a part of the trust estates, to the party of the first part, or to such person or persons as the party of the first part may direct. After the death of the party of the first part, the Trustee may give such proxies to such person or persons as it in its [fol. 207] discretion may select. The Trustee is authorized to continue any investment of which the trust estates may consist at the time of the death of the party of the first part and after the death of the party of the first part, the Trustee may as to each and every such investments participate in reorganizations, consolidations, or exchanges pursuant to the refinancing of corporations whose securities form a part of the trust estates, applying if the Trustee deems it advisable, cash out of principal account for such purpose, and the

Trustee may continue to hold the new securities issuable to it as the result of such participation. Except as to participation in such reorganizations, consolidations and exchanges aforesaid, the Trustee after the death of the party of the first part shall make all reinvestments in such property and securities as are by the law of New York legal investments for Trustees.

The said Trustee shall be under no liability whatsoever for any loss which may arise from the exercise by the Trustee or its failure to exercise any of the powers herein contained.

2. The party of the first part may either in his lifetime or by last will and testament add to the property constituting the corpus of the respective trusts or of any of them such other property as he may from time to time transfer to the Trustee for that purpose and all such property so transferred in his lifetime shall be designated and described by suitable description thereof indicating the distribution of such property among the respective trusts over the signature of the party of the first part and shall thereupon become subject to all the trusts, powers and limitations hereinbefore expressed with regard to property constituting the respective trusts to which the same are to be added.

3. All income herein required to be distributed and paid over by the Trustee shall be distributed in quarter yearly payments on the first day of January, April, July and October in each year at which time the annuity payments shall likewise be made, except in those cases where a different date of payment is expressly described in the foregoing clauses specifically providing for such annuity payments.

4. The Trustee shall receive in full for its compensation for acting as Trustee of the trusts herein created in addition to its necessary expenses, a commission at the rate of One per cent (1%) on the amount of all income received by it [fol. 208] and a commission of one-half of One per cent ( $\frac{1}{2}$  of 1%) on each distribution or other payment of capital.

5. The Trustee shall not be responsible for any diminution of the trust estates resulting from depreciation of securities or property in which it shall have been invested in good faith, and the Trustee shall not be responsible for mistakes or errors in judgment, but shall be responsible only for fraud or willful misconduct of the Trustee, its officers and agents.

6. With respect to each and every annuity hereinbefore recited to be paid for the benefit of any person other than the person to whom the same shall be payable the Trustee shall be under no duty whatsoever to see to the application thereof by any person to whom such annuity is directed to be paid hereby and the receipt of the latter shall be full and ample protection to the Trustee for all purposes hereunder.

7. No sums payable to annuitants shall accrue in favor of said annuitants until the actual date required for their payment.

8. The party of the first part however reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the Laws of the State of New York and filed with the Trustee; but this right of modification, however, shall in no way be deemed or construed to include any rights or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument."

are hereby revoked and in their place and stead the following terms shall apply and govern as to each and every trust created hereunder, to wit:

"1. It shall be lawful for the Trustee to continue to hold any investment, security or other property hereby granted or hereafter part of the trust estate. Nevertheless the Trustee is authorized to dispose of any investment, security or property at public or private sale or by exchange of securities in its absolute discretion. The Trustee shall not be liable for its failure to dispose of any such investment or in respect to any changes of investments by sale, exchange or reinvestment, it being understood and agreed that both in [fol. 209] vestments and reinvestments hereunder may be made in securities not permitted by law as trust investments.

The Trustee may extend any investment which may become due, consent to the reorganization or consolidation of any corporation or sale to any other corporation or person of the property of any corporation the stocks, bonds or other securities of which are at the time held by such Trustee. The Trustee may make exchanges of securities and do any act with reference thereto which the Trustee may deem necessary, proper or expedient, including the payment of moneys

to enable the said Trustee to obtain the benefit of such reorganization, consolidation or sale of such stocks, bonds or other securities held by said Trustee, and to exercise any option for conversion or additional subscription extended by any such corporation or in respect to any such stocks, bonds or other securities, and to make such conversions and subscriptions, and to make any necessary payments therefor, and to hold such new securities in said trust without any liability on the part of the Trustee for any act by it taken in good faith pursuant to the power to it herein granted.

The Trustee may execute full and unlimited proxies to exercise the voting powers upon any stock or securities forming a part of the trust estates to such person or persons as it in its discretion may select.

The said Trustee shall be under no liability whatsoever for any loss which may arise from the exercise by the Trustee or its failure to exercise any of the powers herein contained.

2. All income herein required to be distributed and paid over by the Trustee shall be distributed in quarter yearly payments on the first day of January, April, July and October in each year, at which time the annuity payments shall likewise be made except in those cases where a different date of payment is expressly described in the foregoing clauses specifically providing for such annuity payments.

3. The Trustee shall receive in full for its compensation for acting as Trustee of the trusts herein created in addition to its necessary expenses a commission at the rate of one per cent (1%) on the amount of all income received by it and a commission of one-half of one per cent ( $\frac{1}{2}$  of 1%) on each distribution or other payment of capital.

[fol. 210] 4. The Trustee shall not be responsible for any diminution of the trust estates resulting from depreciation of securities or property in which it shall have invested in good faith, and the Trustee shall not be responsible for mistakes or errors in judgment, but shall be responsible only for fraud or wilful misconduct of the Trustee, its officers and agents.

5. With respect to each and every annuity hereinbefore recited to be paid for the benefit of any person other than the person to whom the same shall be payable the Trustee shall be under no duty whatsoever to see to the application



thereof by any person to whom such annuity is directed to be paid hereby and the receipt of the latter shall be full and ample protection to the Trustee for all purposes hereunder.

6. No sums payable to annuitants shall accrue in favor of said annuitants until the accrual date required for their payment.

7. The party of the first part hereby renounces all rights to further modify the terms of the said trusts or any of them and does hereby surrender all such rights reserved to him by the indenture of December 24th, 1913, and by the various indentures supplemental thereto."

In all other respects except as modified by this Supplemental Indenture the Trust Indentures hereinbefore referred to are hereby reaffirmed and ratified.

In Witness Whereof the party of the first part has hereunto set his hand and seal and the party of the second part has caused its corporate seal to be affixed and these presents to be signed by its Vice President the day and year first above written.

C. H. Sanford, (Seal). Guaranty Trust Company of New York, by F. J. H. Sutton, Vice President.

Attest: C. M. Schmidt, Ass't. Sect'y.

(Seal.)

[fol. 211] STATE OF NEW YORK,  
County of New York, ss:

On this 21st day of August 1924, before me personally appeared Charles Henry Sanford, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Richard H. Parks, Notary Public, Queens County No. 846. Certificate filed in New York Co. No. 138. New York Co. Register's No. 6148. Certificate filed in King's Co. No. 74. King's Co. Register's No. 6071. My Comm. expires March 30, 1926. (Seal.)

STATE OF NEW YORK,  
County of New York, ss:

On this 21st day of August 1924, before me personally came F. J. H. Sutton, to me known, who being by me duly

sworn, did depose and say that he resides in New York City, New York; that he is a Vice President of Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Richard H. Parks, Notary Public, Queens County No. 846. Certificate filed in New York Co. No. 138. New York Co. Register's No. 6148. Certificate filed in King's Co. No. 74. King's Co. Register's No. 6071. My Comm. expires March 30, 1926. (Seal.)

[fol. 212]

18th August 1927.

GUARANTY TRUST COMPANY OF NEW YORK,

Trustee under Deed of Trust dated 24th December 1913  
and supplements thereto created by Charles H.  
Sanford.

Gentlemen,

Under the terms of the above Trust it is provided that Alfred Bird shall receive an annuity of \$2,000 per annum during his life-time and upon his death that said annuity is to be continued to his daughter, Muriel Jane Bird, in the reduced amount of \$1,000 per annum.

The agreement also provides that said annuities are to be paid only in the event that said Alfred Bird shall continue in the employ of either Charles H. Sanford or his wife Emily A. Sanford.

We are aware of the fact that Mr. Sanford desires the said annuities to be paid to said Alfred Bird and his daughter, Muriel Jane Bird, regardless of the question of employment as aforesaid, and in order that his wishes may be carried out we, the undersigned, as beneficiaries of the Trust hereby authorise and direct you as Trustee to continue the payment of the annuity to said Alfred Bird during his lifetime and upon his death to his daughter, Muriel Jane Bird, in the reduced amount stated and to charge the same against the income of the Trust payable to us or any of us under its provisions, and to treat these annuities in the same manner as though said provision relative to the continuation of the

said Alfred Bird's employment by Mrs. Sanford had not been inserted as a provision of the Trust.

We are, dear Sirs,

Very truly yours, Sarita E. Barclay, Frances Phipps,  
Herbert S. Ward.

[fol. 213] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT

No. 6776. October Term, 1938

Estate of CHARLES HENRY SANFORD, Deceased, JENNIE R.  
BAIRD, Administratrix, c. t. a., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

MINUTE ENTRY OF ARGUMENT AND SUBMISSION

And afterwards, to wit, the 3d day of October, 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis, Honorable Joseph Buffington and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

[fol. 214] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT, OCTOBER TERM, 1938

No. 6776

ESTATE OF CHARLES HENRY SANFORD, DECEASED, JENNIE R.  
BAIRD, Administratrix c. t. a., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Upon Petition for Review from the United States Board of  
Tax Appeals

OPINION—Filed March 25, 1939

Before Davis, Buffington and Thompson, Circuit Judges

THOMPSON, Circuit Judge:

This is a petition for review of a decision of the Board of Tax Appeals. The facts hereinafter stated were stipu-

**MICRO CARD**

TRADE

MARK



**22**

**39**



**1082**

**65**



lated and are set forth substantially as found in the petitioner's brief:

On December 24, 1913, Charles Henry Sanford, by a single trust indenture created certain trusts naming Guaranty Trust Company of New York as Trustee, and on that date and at various times thereafter transferred certain property to the Trustee. Of these trusts, four alone are here involved, the "Sarita E. Barclay Trust", the "Frances G. Phipps Trust", the "Herbert S. Ward Trust" and the "Colville H. S. Barclay Trust". These four named beneficiaries were alive and in being on August 21, 1924. The [fol. 215] trustee was directed to dispose of the income and ultimately the principal of the different trusts to the named beneficiaries in accordance with the provisions of the trust indenture.

The trust indenture of December 24, 1913, contained, among others, the following provision:

"The party of the first part (Sanford), however, reserves the right to terminate or modify any or all of the trusts herein created by a suitable instrument in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part." (Guaranty Trust Company of New York.)

Under the power reserved in this provision, Sanford from time to time executed certain supplemental trust indentures amending the provisions of the trusts. Of these, only two are material, namely, the indenture dated November 26, 1919, and the indenture dated August 21, 1924.

By the supplemental indenture of November 26, 1919, Sanford surrendered the power to terminate and to revest in himself all or any part of the income or corpus of the trusts, reserving only a power to modify the trusts in other respects, such as, for example, the power to change beneficiaries. Thus in the supplemental indenture of November 26, 1919, after reciting the powers reserved in the original indenture quoted above and the desire of the settlor to modify such "above-quoted provision," the indenture of November 26, 1919, provided:

"Now, Therefore, the party of the first part does hereby modify the same so that the said clause shall read as follows:



"The party of the first part, however, reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal [fol. 216] and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York, and filed with the party of the second part; but this right of modification, however, shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument.' "

Sanford's powers in respect of the trusts lay in this condition for some five years. On August 21, 1924, by a supplemental indenture executed on that date, Sanford surrendered and renounced all the remaining powers over the trusts. Thus the indenture of August 21, 1924, after reciting certain paragraphs of the trust indenture as amended, including the above quoted paragraph in the supplemental indenture of November 26, 1919, provided that such recited paragraphs—

"are hereby revoked and in their place and stead the following terms shall apply and govern as to each and every trust created hereunder, to wit:°

• • • • •

"7. The party of the first part hereby renounces all rights to further modify the terms of the said trusts or any of them and does hereby surrender all such rights reserved to him by the indenture of December 24th, 1913, and by the various indentures supplemental thereto."

Sanford did not file a gift tax return for 1924. He died in 1928 and the administrator of his estate, after a revenue agent had raised the question as to whether the surrender in 1924 of the power to modify the trusts subjected the transfer to a gift tax at that time, filed a gift tax return with the Collector of Internal Revenue for the District of New Jersey. The property held by the trustee on August 21, 1924, was listed in the return, but the administrator, on behalf of the estate, disclaimed any liability for the tax. [fol. 217] The aggregate value of the property held in the trusts as of that date was \$6,846,225.06.

Conferences were thereafter held between representatives of the taxpayer and representatives of the Government. A tentative ruling of the Bureau of Internal Revenue

held that the gifts were made in 1924, and hence were subjected to tax. A later ruling held that the transfers became effective on November 26, 1919, when Sanford relinquished his right to terminate the trusts and the power to modify them in such a way as to enable him to withdraw principal or income, and that since the gifts were completed before any gift tax law became effective, they were not subject to the tax. This ruling was approved by the Under-Secretary of the Treasury, and the petitioner was notified on April 19, 1935, that the gift tax return for 1924 disclosed no tax liability and the case had been marked closed. However, the case was reopened in the Bureau after the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Hesslein v. Hoey*, 91 F. (2d) 954, certiorari denied, 302 U. S. 756, and on October 16, 1937, the Commissioner mailed a notice of a deficiency in the amount of \$1,000,745.00.

Upon appeal the Board of Tax Appeals sustained the action of the Commissioner in asserting the deficiency.

The Revenue Act of 1924 (43 Stat. 253), approved June 2, 1924, imposed a tax upon the transfer of property by gift. No gift tax was in effect in previous years. Section 319 provided:

"For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly:"

Article 1 of Treasury Regulations 67, promulgated under the Revenue Act of 1924, provides:

[fol. 218] "The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised, a taxable transfer will be treated as taking place in the year in which such power is terminated."

This is a negative provision that the gift is not completed if the settlor retains the power to revest the corpus

of the trust in himself. The petitioner maintains that by reason of the Act and Regulation a gift is completed when the settlor surrenders his power to terminate the trust and his privilege to withdraw the principal and interest. This took place on November 26, 1919, which was prior to the effective date of the gift tax act. The Commissioner argues that the gift remained incomplete until such time as the settlor surrendered his right to make any modifications of the terms of the trust. This took place on August 21, 1924, after the effective date of the gift tax act.

The Commissioner frankly admits that in *Hesslein v. Hoey*, supra, the Government took the position that the gift became effective when the settlor surrendered all power to revest title in himself or his estate. The Circuit Court of Appeals for the Second Circuit, however, rejected this view and held that a transfer to a trust was not taxable as a gift so long as the settlor retained the power to modify the trust, even though the modification did not result in a benefit to himself or his estate. Despite a dissent by one of the Circuit Court Judges, the Supreme Court denied certiorari (302 U. S. 756). Had it not been for the ruling by the Second Circuit and the action of the Supreme Court in denying certiorari, we would have favored the view that the tax was imposed on the transfer of property and that the transfer took place when the trustee was given such possession that the settlor could not regain it for himself or his estate. We are persuaded by the reasoning of the majority opinion in *Hesslein v. Hoey*, supra, that a gift is not complete if the donor has the power and privilege to take everything away from the named donee and designate another donee, or to prolong the time before the donee takes possession or to alter the conditions with which the donee must comply before being given possession. Accordingly, we reach the conclusion that until the right to modify the trust agreements was surrendered, there were no gifts upon which a gift tax could be imposed.

The opinion of the Supreme Court in *Helvering v. Reynolds Tobacco Company*, — U. S. — (opinion filed January 30, 1939) does not dispose of the question involved in the instant case.

The decision of the Board of Tax Appeals is affirmed.

A true Copy:

Teste:

— — —, Clerk of the United States Circuit Court  
of Appeals for the Third Circuit.

[fol. 220] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT

No. 6776. October Term, 1938

ESTATE OF CHARLES HENRY SANFORD, DECEASED, JENNIE R.  
BAIRD, Administratrix, c. t. a., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JUDGMENT—Filed March 25, 1939

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, March 25, 1939.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

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[fol. 221] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 222] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 15, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accom

panied the petition shall be treated as though filed in response to such writ.

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Endorsed on Cover: File No. 43,366. U. S. Circuit Court of Appeals, Third Circuit. Term No. 34. Estate of Charles Henry Sanford, Deceased, Jennie R. Baird, Substitutionary Administratrix, c. t. a., Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed April 17, 1939. Term No. 34, O. T. 1939.

(2136)





**FILE COPY**

Office - Supreme Court, U. S.

**FILED**

**APR 17 1939**

**CHARLES ELMORE CROPLEY**

**CLERK**

IN THE

**Supreme Court of the United States,**

OCTOBER TERM, 1938.

No. 

**34**

ESTATE OF CHARLES HENRY SANFORD, Deceased,  
Jennie R. Baird, Substitutionary Administratrix, c.t.a.,  
*Petitioner,*

*against*

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT AND BRIEF IN SUPPORT.**

JOHN W. DAVIS,  
MONTGOMERY B. ANGELL,  
WILLIAM A. CARR,

*Attorneys for Petitioner.*



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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1938.

**ESTATE OF CHARLES HENRY SANFORD, De-  
ceased, Jennie R. Baird, Substitution-  
ary Administratrix, c.t.a.,**

**Petitioner,**

**against**

**COMMISSIONER OF INTERNAL REVENUE,  
Respondent.**

**No.**

**PETITION FOR A WRIT OF CERTIORARI TO THE  
CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT AND BRIEF IN SUPPORT.**

**TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:**

The Estate of Charles Henry Sanford, Deceased, Jennie R. Baird, Substitutionary Administratrix, c.t.a., petitions for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Third Circuit rendered on March 25, 1939, which affirmed a decision of the United States Board of Tax Appeals made on April 14, 1938, sustaining a deficiency asserted by the Commissioner of Internal Revenue.

**The Nature of the Proceeding.**

The appeal instituted in the Board of Tax Appeals was to review a deficiency in Federal gift taxes for the year 1924 amounting to \$1,000,745. Sanford, the decedent, died in 1928, a resident of Monmouth County, New Jersey. In 1913,

Sanford created certain trusts, of which Guaranty Trust Company of New York was Trustee, reserving full powers of revocation. In 1919, some five years prior to the passage of the first Federal Gift Tax Act in 1924, Sanford surrendered the power of revocation, reserving only the right to modify the trusts, which right expressly excluded any right or privilege to revest in himself the principal or income of the trusts. On August 21, 1924, after the passage of the Gift Tax Act, Sanford surrendered the reserved right to modify. The value of the corpus of the trusts on August 21, 1924, was \$6,846,225.06.

The Board of Tax Appeals held that a gift subject to the gift tax did not occur until 1924 when the limited right of modification was terminated, and sustained a deficiency computed upon the full value of the corpus of \$6,846,225. The petitioner appealed to the Circuit Court of Appeals for the Third Circuit, and it is the decision of the Circuit Court of Appeals affirming the Board which the petitioner seeks to review in this Court.

### **The Question Presented.**

The single question involved is whether a gift made in trust is subject to the Federal gift tax in the year the settlor irrevocably relinquishes the power to revest in himself the income or corpus of the trust, reserving a power to modify in other respects (such as the power to change beneficiaries), or in a later year when the remaining power to modify is surrendered, the trust concededly being a valid and enforceable trust and not failing for the lack of a donee.

### **Summary Statement of Matter Involved.**

On December 24, 1913, Sanford set up certain trusts, naming Guaranty Trust Company of New York as Trustee, and transferred certain property to the Trustee. The Trustee was directed to collect the income and profits and to distribute the income and ultimately the principal among the

named beneficiaries. The indenture reserved to Sanford the right to revoke the trusts. On November 26, 1919, Sanford surrendered the power to revoke, retaining only a power to modify—

“but this right of modification, however, shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument.”

On August 21, 1924, Sanford surrendered and renounced all the remaining powers over the trusts.

Originally no gift tax return for 1924 was filed, but in the fall of 1934, following an interview with an examining revenue agent, the representative of the estate filed a gift tax return with the Collector of Internal Revenue in Newark, listing the property comprising the corpus of the trusts on August 21, 1924, but disclaiming any liability for tax. On audit of this return, the Bureau of Internal Revenue first issued a tentative ruling (unpublished) upholding the tax on the ground that the gift was not complete until the surrender of the power to modify in 1924. Some two months later, after hearing representatives of the estate, the Assistant General Counsel for the Bureau promulgated a second ruling (also unpublished), which, unlike the earlier ruling, quoted and applied Article 1 of Regulations 67 (1924 Edition) promulgated under the Gift Tax Act of 1924 and held that there was no gift tax payable since—“So far as Sanford was concerned the gift was complete on the date when he relinquished the right to terminate the trusts.”

This second ruling was approved by the Under-Secretary of the Treasury, and the estate was advised that an examination of the return “discloses no gift tax liability.”

The case remained closed for some two and a half years. On July 26, 1937, the Circuit Court of Appeals for the Second Circuit handed down its decision in *Hesslein v. Hoey*, 91 F. (2d) 954. In conformity with the Treasury's final ruling in the *Sanford* case, the Government in the

*Hesslein* case contended that in the case of a gift in trust the gift tax attaches at the point when the settlor surrenders the power to revest in himself income or principal, which in the *Hesslein* case occurred on the creation of the trust. The Second Circuit, nevertheless, decided against the Government and sustained the taxpayer, Judge Swan writing for himself and Judge Manton; Judge Augustus N. Hand dissenting.

Following the decision in the *Hesslein* case, the *Sanford* case was reopened, and in an unpublished memorandum the Chief Counsel, after saying that the second *Sanford* ruling "gives full effect to the [Commissioner's] regulations," nevertheless directed the issuance of a deficiency letter against the *Sanford* Estate, which letter was delivered a day or two before the running of the statute of limitations.

The Government applied to this Court for a writ of certiorari in the *Hesslein* case, but the application was denied (302 U. S. 756).

Article 1 of Regulations 67 (1924 Edition) has not been changed but remains in effect, unaltered, today.

The Stipulation of Facts of record in this (the *Sanford* Estate) case contains the following paragraph (R. 21):

"9. In his administration of the Gift Tax Act of 1924 and the Gift Tax Act of 1932, and prior to the promulgation of the decision in the case of *Hesslein v. Hoey*, 91 Fed. (2) 954, decided July 26, 1937, it has been the uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved to treat the taxable transfer subject to the gift tax as occurring when the transferor relinquished all power to revest in himself title to the property constituting the subject of the transfer. It is estimated that approximately 300 cases of such character have been closed or were adjusted in accordance with the above practice."

Unlike the present record, the record in the *Hesslein* case was very meager; the Court did not have before it (and in the application for certiorari this Court did not have before it) the care with which the Treasury considered the

question in the *Sanford* case, terminating in the second ruling; it did not have before it the uniformity of the Commissioner's Regulations since 1924 and the consistent and uniform practice of the Commissioner in administering the Gift Tax Acts; and it did not have before it the illuminating comments made in Congress at the time of the enactment of the Gift Tax Act of 1924, definitely sustaining our interpretation (See *infra*, p. 15).

The Circuit Court of Appeals for the Third Circuit, after referring to the *Hesslein* case, said (R. 76, 77) :

"Despite a dissent by one of the Circuit Court Judges, the Supreme Court denied certiorari \* \* \*. Had it not been for the ruling by the Second Circuit and the action of the Supreme Court in denying certiorari, we would have favored the view that the tax was imposed on the transfer of property and that the transfer took place when the trustee was given such possession that the settlor could not regain it for himself or his estate."

### **Reasons Why the Writ of Certiorari Should Issue.**

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

Whatever rule is adopted in this case must necessarily control future transfers of similar character. The decision of the Court below, if allowed to stand, will result in flagrant and widespread avoidance of Federal income taxes. The Gift Tax Act of 1924 was enacted as part of the Revenue Act of 1924. The Income Tax Title of that Act included a new section, Section 219 (g), which read as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, *the power to revest in himself title to any part of the corpus of the trust*, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." (Italics ours.)



Under the clear implication of this language, when a trust is made irrevocable, that is to say, when the grantor ceases to have "the power to revest in himself title to any part of the corpus of the trust", the burden of paying income taxes in respect of the income from the trust shifts from the grantor to the trust estate, a rule which has been consistently applied. *Knapp v. Hoey*, 24 F. Supp. 39; *Phebe W. M. Downs*, 36 B. T. A. 1129; *Thomas H. Blodgett*, B. T. A. (memo) Dkt. No. 87180, March 11, 1938 (C. C. H. Dec. 10004-B). For income tax purposes, the test is the existence or absence of the grantor's control over the corpus (and hence the income) for himself, a rule which was upheld in *Corliss v. Bowers*, 281 U. S. 376.

But if for gift tax purposes the Federal gift tax is postponed until the surrender of the power of modification, there is no deterrent preventing a wealthy individual from relieving himself of burdensome income surtaxes in respect of a large part, if not all, of his property by the simple expedient of making gifts in trust to members of his immediate family or friends, in which he relinquishes the power to revest in himself income or principal and reserves a power to change beneficiaries, which, of course, need never be exercised: In this simple fashion a taxpayer may split up his wealth and so cut many times the income tax revenues, yet escape the exaction of any gift tax. The Treasury in considering the *Sanford* case was quick to see the magnitude of such an income tax loophole.\*

The gift tax will supplement and protect the estate tax equally well, whichever interpretation is adopted. In the

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\* In submitting the second *Sanford* ruling to the Under-Secretary of the Treasury, a high Treasury official wrote (R. 40):

"I am now convinced that the position tentatively taken in the prior opinion should not be maintained, and that its possible prejudicial results upon the revenues both from gift tax and income tax far outweigh the considerable revenue we would gain from asserting a gift tax liability against this trust."

case of the creation of an *inter vivos* trust, if any power remains outstanding at death, whether a power of revocation and revestment or merely a power to alter or amend, the trust corpus falls within the gross estate for estate tax purposes (Section 302(d) of the Estate Tax Act of 1924), subject to the statutory gift tax credit in the event of the imposition of a prior gift tax (Section 322 of the Revenue Act of 1924). If no power remains outstanding at death, the corpus is not a part of the gross estate, but a gift tax necessarily must have been paid prior to the removal of the property from the scope of the estate tax, regardless of whether the gift tax is imposed at the time of the surrender of the power to revest or, later, on the surrender of the power to modify. Accordingly, on whichever date the gift tax is imposed, it will implement equally well the estate tax, for in either case the collection of a gift tax on the full corpus of the trust is assured before the corpus is excluded from the estate tax.

But there is this important difference. If the gift tax does not arise until the right to modify is surrendered, all gift taxes may readily be avoided by the simple expedient of retaining the power until death, when the estate tax in any event will be collected. And in the interval the taxpayer has successfully relieved himself of the heavy income surtaxes and thus escaped his just burden of taxation. The doctrine of the decision below is a doctrine of tax postponement and tax avoidance.

In construing a statute, the intention of Congress is controlling. It could hardly have been the intention of Congress that the gift tax be applied in such a fashion as to render inharmonious the administration of the three main classes of taxes, income, gift and estate, when such an application would result in grave loopholes of tax avoidance. Yet this is the effect of the decision below. Before such an interpretation becomes finally established, the rule should be considered and reviewed by this Court.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

The decision below, we submit, is sharply in conflict with the decisions of this Court in *Burnet v. Guggenheim*, 288 U. S. 280, and *Helvering v. Reynolds Tobacco Co.*, No. 328, decided January 30, 1939.

In the *Guggenheim* case, this Court held that in the case of a gift in trust originally revocable but later made irrevocable by the surrender of the reserved power to revoke, the Federal gift tax attached on the surrender of the power to revoke. There the reserved power, later surrendered, was a power to revoke, modify or alter, but Mr. Justice Cardozo, who wrote for the Court, throughout his opinion referred to the power in every instance as "the power of revocation" or "the power to revest title in himself", and such like. "Congress", said this Court, "did not mean that the tax should be paid twice, or partly at one time and partly at another." And again, "There must be a choice, and a consistent choice, between the one date and the other. To arrive at a decision, we have therefore to put to ourselves the question, which choice is it the more likely that Congress would have made?" In selecting the date when the power of revocation was surrendered, the Court concluded that the statute "is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall." The clear implication is that when "put beyond recall", a taxable gift occurs. This happens when the settlor surrenders the power to revest in himself title to the corpus and income of the trust. The decision below, withholding the tax even after the gift in trust was "put beyond recall", is sharply in conflict with the decision of this Court in the *Guggenheim* case.

The decision below is in conflict with the decision of this Court in *Helvering v. Reynolds Tobacco Co.*, No. 328, decided January 30, 1939. That case involved the question whether a corporation realizes gain or loss on the purchase or sale

of its own stock. From 1920 to 1934, the administrative construction placed upon the applicable provision of the revenue laws as embodied in the Commissioner's formally promulgated regulations was uniform and consistent. In 1934, the Treasury changed its regulations. In upholding the interpretation adopted in the original regulations, this Court announced the rule that since the original regulations had received legislative approval by reenactment of the underlying statutory provisions, such regulations have the force of law, and, therefore, "Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed."

In the field of gift taxes, Article 1 of the Commissioner's Regulations 67, issued directly on the passage of the Gift Tax Act of 1924, unequivocally provided that "a taxable transfer will be treated as taking place in the year in which" the grantor terminates "the power to revest in himself title to the corpus of the trust." With this regulation outstanding, Congress in 1932 reenacted the Gift Tax Act in the same language as used in the 1924 Act. Article 1 of Regulations 67 (1924 Edition) is still outstanding and in effect, unaltered in any respect, and today represents the Commissioner's formal interpretation of the Gift Tax Act of 1924. Yet the Court below failed to apply the clear rule of the regulation, which in view of the *Reynolds Tobacco* case must now be considered as having the force of law.

### **Prayer.**

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and

determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioner be granted such other and further relief as may be proper.

ESTATE OF CHARLES HENRY SANFORD, Deceased,  
Jennie R. Baird, Substitutionary  
Administratrix, c.t.a.

By JOHN W. DAVIS,  
MONTGOMERY B. ANGELL,  
WILLIAM A. CARR,  
Her Attorneys.

Dated, New York, N. Y., April 14, 1939.



**BRIEF IN SUPPORT OF PETITION.**

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**Opinions Below.**

The memorandum opinion of the Board of Tax Appeals is unreported but appears at R. 47; the opinion of the Circuit Court of Appeals is unreported but appears at R. 72.

**Jurisdiction.**

The judgment of the Circuit Court of Appeals was entered March 25, 1939. The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, 28 U. S. Code § 347a, as amended by the Act of February 13, 1925.

**Statement of the Case.**

A summary statement of the facts is given in the petition, pp. 2-5, above.

**Statutes Involved.**

The statutes involved are set forth in an Appendix attached to the brief.

## POINT I.

**The incidence of the gift tax is upon the transfer by the donor and not upon the receipt by the beneficial taker.**

The statutory language is as follows:

“ \* \* \* a tax \* \* \* is hereby imposed upon the transfer  
\* \* \* by gift \* \* \* of any property \* \* \* .”

Clearly, the incidence of the tax is upon the *transfer* by the *donor* and *not* upon the *receipt* by the beneficial taker. Had Congress intended to lay the tax on the receipt, it would have said so.

Following the enactment of this Act, the Commissioner promulgated his formal regulations interpreting the statute. Article I of Regulations 67 provides that, on the creation of a trust “where the grantor retains the power to revest in himself title to the corpus of the trust” no gift subject to the tax occurs, but—

“Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated.”

This Regulation remains in full force and effect, unaltered and unamended, even to this day. This is not surprising, for the rule of the Regulation has received explicit Congressional approval as evidenced, first, by the reenactment of the Gift Tax of 1932 in the same language as the 1924 Act\*, and, second, by the incorporation in the later statute of a new section (Sec. 501(c)), which expressly adopted the language of the 1924 regulation. Section 501(c) provided that “the

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\* The 1932 Act laid “a tax \* \* \* upon the transfer \* \* \* of property by gift.”

relinquishment or termination" of "the power to revest in the donor title to" the trust property "shall be considered to be a transfer by the donor by gift of the property subject to such power." With reference to the 1924 Regulation and Section 501(c) this Court said in the *Guggenheim* case, *supra* (p. 283): "We think the regulation, and the later statute construing it, are declaratory of the law which Congress meant to establish in 1924." Following the decision in the *Guggenheim* case, Congress repealed Section 501(c) as no longer necessary, for, as the accompanying House and Senate Committee Reports stated it, "The principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court's decision in the *Guggenheim* case."\* Under these circumstances, the Regulations issued under the 1924 Act should be interpreted as if Section 501(c) were still in effect. It is hard to conceive of a clearer case of legislative approval of the Commissioner's regulations.

The Regulations issued under the Revenue Act of 1932 adopted and continued the rule of the 1924 Regulations. (See Article 3, Regulations 79 (1933 Edition); Article 3, Regulations 79 (1936 Edition)).

As a matter of administrative practice, from the enactment of the first Gift Tax Act in 1924 until the *Hesslein* decision was announced in 1937 the Commissioner uniformly applied the rule of the Regulations, and some 300 cases have been closed accordingly (p. 4, *supra*).

It is the established rule of the decisions of this Court that where such uniformity in published Regulation and departmental practice has existed over a long period, the rule will not be disturbed, particularly where there has been a subsequent reenactment of the statute without change. *Logan v. Davis*, 233 U. S. 613, 627 (1914); *Brewster v. Gage*, 280 U. S. 327, 336 (1930); *Mass. Mutual Life Ins. Co. v. U. S.*, 288 U. S. 269, 273 (1933). In the *Mass. Mutual Life*

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\* House Rep. No. 704, 73d Cong., 2d Sess., p. 40; Sen. Rep. No. 558, 73d Cong., 2d Sess., p. 50.

*Ins. case, supra*, (an income tax case), this Court said that the subsequent action of Congress—

“was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute \* \* \*”

This rule has only recently been given added weight in the *Reynolds Tobacco Company* case, decided this Term on January 30, 1939 (see pp. 8-9, *supra*).

To delay the gift tax until the surrender of the power to modify, as the Court below has decreed, is to ignore the force and effect of an unambiguous Regulation and the consistent administrative practice followed for thirteen years; to ignore the clear legislative approval of the Regulation by the enactment of the second Gift Tax Act without change of language and the incorporation in such Act of the language of the Regulation; and to ignore the statement of this Court in the *Guggenheim* case (p. 283) that “the regulation, and the later statute construing it, are declaratory of the law which Congress meant to establish in 1924.”

## POINT II.

**The debates in Congress occurring at the time of the enactment of the 1924 Gift Tax Act evidence a legislative intent directly in conflict with the decision of the Court below.**

The bill which later became the Gift Tax Act of 1924 was defeated in the Committees of both Houses, but when the Revenue Bill of 1924 was introduced in the House and the Senate, Representative Green, Chairman of the House Com-

mittee, and Senator Walsh of Massachusetts, Chairman of the Senate Committee, introduced an amendment on the floor of the House and Senate, which ultimately was enacted as the Gift Tax Act of 1924. During the course of the debates, Representative Green, Senator Walsh and Representative Garner, also an earnest advocate of the bill, repeatedly stated that one of the major purposes in imposing a tax on gifts was to create a deterrent in the splitting up of large estates, with the consequent loss of income surtaxes. For example, Representative Green stated that the proposed amendment was a corollary of the estate tax necessary to prevent estate tax avoidance, and then continued (65 Cong. Rec., 1st Sess., 3120):

"This amendment also is needed on account of the income tax. The splitting up of large estates, of course, reduces the amount of surtaxes to be laid upon the party who so divides them. We have lost more, in my judgment, by the division of these large estates in our income taxes than we have lost by reason of tax exempt securities."

This is only one of a number of instances where the same purpose was voiced by the sponsors of the bill.\* Yet under the interpretation which the Court below has given to the Act, the gift tax will not act as any deterrent (see p. 6, *supra*), and thus the decision below defeats one of the major purposes of the gift tax legislation.

Again, when the Revenue Bill of 1932 was reported out of Committee, the Committee Reports of both Houses† contained the following statement:

"The gift tax will supplement both the estate tax and the income tax. It will tend to reduce the incentive to make gifts in order that distribution of future income

\* 65 Cong. Rec., 1st Sess., pp. 3172; 3173; 8095-6; 8096.

† House Rep. No. 708, 72nd Cong., 1st Sess., p. 28; Sen. Rep. No. 665, 72nd Cong., 1st Sess., p. 40.



from the donated property may be to a number of persons with the result that the taxes imposed by the higher brackets of the income tax law are avoided. It will also tend to discourage transfers for the purpose of avoiding the estate tax."

### POINT III.

**The decision below is in conflict with the decisions of this Court in the *Guggenheim* case and the *Reynolds Tobacco* case.**

The *Guggenheim* case and the *Reynolds Tobacco* case are discussed at pages 8-9 of the petition.

In the latter part of Mr. Justice Cardozo's opinion in the *Guggenheim* case, certain comments were made which were misinterpreted by the Circuit Courts of Appeals. Mr. Justice Cardozo said that the imposition of a gift tax upon the value of the trust corpus would be a hardship "when nothing has been done to give assurance that any part of the principal will ever go to the donee." In relying upon this statement, the Courts below overlooked the fact that this Court was considering a *revocable* trust, and that the statement was addressed to the contention that a completed gift occurred on the *creation* of a revocable trust. Clearly the statement was not aimed at, and it cannot properly be applied to, a case where the trust has become *irrevocable* by the settlor's surrender of all power to revest in himself income or corpus. In the one case there is in reality no permanent donee, for by exercising the power of revocation the grantor may undo everything that he has done. But after a grantor has surrendered the power to revest corpus and income in himself, the trust is final and permanent and a final and permanent donee exists, namely, the trust estate,\* for while under the

---

\* *Commissioner v. Krebs*, 90 F. (2) 880 (C. C. A. 3d); *Commissioner v. Wells*, 88 F. (2) 839 (C. C. A. 7th).

reserved power to modify the grantor may change the beneficiaries, such a power is a special power in trust\* and he no longer can retake the trust corpus or destroy the gift. In such a case, the payment of the tax upon the surrender of the power to revest creates no hardship, whether the tax is collected from the donor or, on the donor's inability to pay, from the trust estate. There exists a definite and final donee and a definite and completed gift in trust, regardless of the power to appoint to a new beneficiary, since the power cannot be exercised in favor of the grantor and the trust thus destroyed.

Mr. Justice Cardozo also said that the gift tax and the estate tax are parts of the same Title and that the two statutes are in *pari materia*. Relying upon this comment the Circuit Courts of Appeals erroneously concluded that the gift tax and the estate tax should receive like application in the sense that since the estate tax embraces an *inter vivos* gift subject to a power to alter or amend, the gift tax should be construed as excluding an *inter vivos* transfer so long as a power to alter or amend remains outstanding. But plainly from the context Mr. Justice Cardozo advanced the similarity only to support his ultimate conclusion that in applying the gift tax form should not be exalted over substance; certainly there is nothing in the opinion justifying the inference that because Section 302(d) of the Estate Tax Act brings in to the gross estate the corpus of a trust subject to a power to alter and amend, the tax on gifts *inter vivos* should be delayed so long as a power to alter or amend remains outstanding.

In *Porter v. Commissioner*, 288 U. S. 436, an estate tax case involving the existence at death of a power to alter (decided shortly after the *Guggenheim* case), this Court itself has recognized the difference in character of the two statutes. After pointing out that the estate tax provisions cover dis-

\* See New York Real Property Law, §§135, 138 and 144 (applicable equally to personal property, *Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 N. Y. 295).

junctively the several classes of powers, it was said (p. 443): "*So far as concerns the tax here involved [i. e. the estate tax], there is no difference in principle between a transfer subject to such changes and one that is revocable.*"

Clearly the estate tax is operative, whether the power outstanding on death is the power to revoke or the power to alter or amend. The estate tax by its nature is a final tax. But the gift tax, unlike the estate tax, is an intermediate and not a final tax. Unless the gift tax is imposed at the point when the obligation to pay income surtaxes shifts from the grantor to the trust estate, the gift tax will be definitely out of harmony with the income tax, resulting in widespread income surtax avoidance. This would defeat one of the major purposes of Congress in enacting the gift tax; and at the same time add nothing in supplementing or protecting the estate tax.

### **Conclusion.**

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

JOHN W. DAVIS,  
MONTGOMERY B. ANGELL,  
WILLIAM A. CARR,  
Attorneys for Petitioner.

Dated, New York, N. Y., April 14, 1939.

## **APPENDIX.**

### **The Gift Tax Statutes.**

#### **Section 319 of the Revenue Act of 1924:**

"For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: \* \* \*"

#### **Section 501 of the Revenue Act of 1932:**

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

\* \* \* \* \*

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift."

[Subdivision (c) of Section 501 was later repealed by Section 511 of the Revenue Act of 1934. See Brief, p. 13, *supra*.]

### **The Gift Tax Regulations.**

#### **Article 1, Regulations 67 (1924 edition):**

"The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the

trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated."

**Article 3, Regulations 79 (1933 edition):**

"Transfers in trust.—Where property is transferred in trust without an adequate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, but, where the donor reserves such power, the transfer does not constitute a gift within the meaning of the statute. The relinquishment or termination, without an adequate and full consideration in money or money's worth, of the power to revest in the donor title to property transferred in trust, is a gift of such property at the time of the relinquishment or termination of the power, except where the power is terminated by the donor's death."

**Income and Estate Tax Provisions Covering Reserved Powers.**

**Section 219 (g) of the Income Tax Act of 1924:**

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

**Section 302 of the Estate Tax Act of 1924:**

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property \* \* \*—

(a) To the extent of the interest therein of the decedent at the time of his death \* \* \*



(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;"



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IN THE  
**Supreme Court of the United States**

**October Term, 1939.**

**No. 34.**

ESTATE OF CHARLES HENRY SANFORD, Deceased,  
Jennie R. Baird, Substitutionary Administratrix,  
c. t. a.,

*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.

**BRIEF FOR THE PETITIONER.**

JOHN W. DAVIS,  
MONTGOMERY B. ANGELL,  
WILLIAM A. CARR,  
*Attorneys for the Petitioner.*



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IN THE  
**Supreme Court of the United States**  
October Term, 1939.

ESTATE OF CHARLES HENRY SANFORD,  
Deceased, Jennie R. Baird, Substi-  
tutionary Administratrix, c. t. a.,  
*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

No. 34.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

**BRIEF FOR THE PETITIONER.**

***Opinions Below and Jurisdiction.***

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 103 F. (2d) 81, and appears at R. 173; the opinion of the Board of Tax Appeals is unreported but appears at R. 33.

The judgment of the Circuit Court of Appeals was entered on March 25, 1939 (R. 178). A petition for certiorari was filed on April 17, 1939, and was granted May 15, 1939 (R. 178). The jurisdiction of this Court arises under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

***Statement of the Case.***

The case involves an asserted deficiency in Federal gift taxes for 1924 amounting to \$1,000,745, and arises

under the gift tax provisions of the Revenue Act of 1924 (Part II of Title III, Sections 319-324). The Board of Tax Appeals sustained the deficiency asserted by the Commissioner of Internal Revenue, and the Circuit Court of Appeals upheld the Board.

Sanford, the decedent, died in 1928, a resident of New Jersey. In 1913, Sanford created certain trusts, reserving full powers of revocation and modification. In 1919, some five years prior to the passage of the first Federal Gift Tax Act, Sanford surrendered the power of revocation, reserving only the right to modify the trusts, which right expressly excluded any right or privilege to revest in himself the principal or income of the trusts. In 1924 Sanford surrendered the reserved right to modify. The value of the corpus of the trusts at that time was \$6,846,225.

The Board of Tax Appeals and the Circuit Court of Appeals held that a taxable transfer did not occur until 1924, when the limited right of modification was terminated, and sustained a deficiency computed upon the full value of the corpus of \$6,846,225.

On May 22, 1939, this Court granted the petition of the Government for certiorari in the case of *Rasquin, Collector v. Humphreys*, No. 37, October Term, 1939, decided by the Circuit Court of Appeals for the Second Circuit; and in the same order the *Humphreys* case was set down for argument directly following the *Sanford* case. The position of the Government in the *Humphreys* case is squarely in conflict with its position in this case, which it frankly admitted in its memorandum of non-opposition filed in response to our petition for certiorari.

### ***The Question Presented.***

The single question here involved is whether a gift made in trust is subject to the Federal gift tax in the year the settlor irrevocably relinquishes the power to revest in himself the income or corpus of the trust, reserving a power to modify in other respects (such as the power to change beneficiaries), or in a later year when the remaining power to modify is surrendered, the trust concededly being a valid and enforceable trust and not failing for the lack of a donee.

### ***The Statutes and Regulations Involved.***

The statutes and the regulations involved are set forth in an Appendix, *infra*, pages 63-65.

### ***Statement of the Facts.***

The case was tried upon the petition and answer, and one main and two supplemental stipulations of fact (R. 10, 12, 32), with exhibits attached. There was no oral testimony. The Board adopted the facts as stipulated "for all purposes of this proceeding" (R. 33). The facts, therefore, are not in dispute.

On December 24, 1913, Charles Henry Sanford by a single trust indenture created certain trusts, naming Guaranty Trust Company of New York as Trustee, and on that date and at various times prior to 1924 transferred certain property to the Trustee (R. 11). Originally there were six trusts, a trust for Colville H. S. Barclay, a great grandchild, and five trusts for five grandchildren. Two of these five died without issue, terminating their trusts, and on such deaths the settlor added the corpus of these

trusts to the trusts for the remaining grandchildren (R. 65-67, 99-100). This left four trusts in existence on August 21, 1924 (R. 100, 162).† The named beneficiaries of these four trusts were alive and in being on that date (R. 12). Under the provisions of the trust indenture, the Trustee was directed to collect the income and profits and to distribute the income and ultimately the principal among the named beneficiaries (R. 47-51).

The trust indenture of December 24, 1913, contained, among others, the following provision (R. 52):

“The party of the first part [Sanford], however, reserves the right to terminate or modify any or all of the trusts herein created by a suitable instrument in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York and filed with the party of the second part [Guaranty Trust Company of New York].”

Under the reserved power, Sanford from time to time executed certain supplemental trust indentures amending the provisions of the trusts. Of these, only two are material, the indenture dated November 26, 1919 (R. 90), and the indenture dated August 21, 1924 (R. 162).

By the supplemental indenture of November 26, 1919, Sanford surrendered the power to revest in himself all or any part of the income or corpus of the trusts, reserving only a power to modify the trusts in other respects, such as, for example, the

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† These trusts were known as the “Sarita E. Barclay Trust”, the “Frances G. Phipps Trust”, the “Herbert S. Ward Trust” and the “Colville H. S. Barclay Trust” (R. 162; Notice of Deficiency, R. 8).

power to change beneficiaries. Thus the indenture of November 26, 1919, after reciting the powers reserved in the original indenture quoted above and the desire of the settlor to modify such "above-quoted provision", provided (R. 91):

"Now, therefore, the party of the first part does hereby modify the same so that the said clause shall read as follows:

"The party of the first part, however, reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York, and filed with the party of the second part; but this right of modification, however, shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument.' "

Sanford's powers in respect of the trusts lay in this condition for some five years. On August 21, 1924, by a supplemental indenture executed on that date, Sanford surrendered and renounced all the remaining powers over the trusts. Thus the indenture of August 21, 1924, after reciting certain paragraphs of the trust indenture as amended, including the above quoted paragraph in the indenture of November 26, 1919, provided that such recited paragraphs (R. 169, 171)—

"are hereby revoked and in their place and stead the following terms shall apply and govern as to each and every trust created hereunder, to wit:

\* \* \* \* \*

"7. The party of the first part hereby renounces all rights to further modify the terms



of the said trusts or any of them and does hereby surrender all such rights reserved to him by the indenture of December 24th, 1913, and by the various indentures supplemental thereto."

***The Filing of a Gift Tax Return and the History of the Case in the Treasury Department.***

Sanford did not file a gift tax return for the year 1924 (R. 11). He died December 22, 1928, a resident of Monmouth County, New Jersey.† Joseph McDermott was duly appointed and acted as administrator c.t.a. until his death on June 10, 1938 (R. 10, 11).††

In the early fall of 1934, a revenue agent in an interview with McDermott raised the question as to whether Sanford's surrender on August 21, 1924, of all further right to modify the terms of the trusts constituted a taxable transfer of the corpus of the trusts. Following this interview, McDermott prepared and filed a gift tax return on behalf of the Sanford Estate with the Collector of Internal Revenue for the District of New Jersey in Newark (R. 11, 12), listing the property comprising the corpus of the trusts on August 21, 1924, but disclaiming any liability for a gift tax (R. 11).

On the audit of this return a hearing was had in Washington in October, 1934, before the Miscellane-

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† The gifts accomplished by the creation of these trusts were not gifts in contemplation of death. The question of the inclusion of the corpus of the trusts was raised by the Bureau in auditing Sanford's estate tax return, a case was made and after full consideration the Bureau ruled that the corpus of these trusts was not includible as part of the gross estate (R. 43).

†† Joseph McDermott died on June 10, 1938; on August 23, 1938, Jennie R. Baird was duly appointed to succeed him; and by order of the Circuit Court of Appeals dated September 2, 1938, Jennie R. Baird as Substitutionary Administratrix c. t. a. was substituted in these proceedings.

ous Tax Unit, at which counsel for the estate appeared. A memorandum of law was filed on its behalf and the question was fully argued and considered (R. 12). Thereafter the question was referred to the Assistant General Counsel for the Bureau of Internal Revenue (the officer now known as the Chief Counsel for the Bureau).

In February, 1935, responsive to a letter from the Under Secretary of the Treasury inquiring about the *Sanford* case, the Assistant General Counsel issued a memorandum addressed to the Under Secretary (unpublished), known as G. C. M. 14497, expressing the opinion that the gift was not "effective and absolute" until August 21, 1924, when the power of modification was surrendered, adding, however, that the ruling was tentative only and should be considered as "subject to change" on the production of additional evidence justifying a different conclusion. The memorandum set forth the statute, the facts and a discussion of some court decisions, but it neither referred to nor considered the pertinent regulations of the Commissioner of Internal Revenue issued under the Gift Tax Act of 1924. The memorandum was signed "Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue" over the initials "A. H. K.", referring to Arthur H. Kent, at that time Assistant to the Assistant General Counsel (R. 13, 21).

Some two months later, in March, 1935, a formal hearing in the case was held before the Assistant General Counsel. There were present at this hearing counsel for the estate and some ten or twelve representatives of the Assistant General Counsel's office and of the Miscellaneous Tax Unit, including Mr. Kent acting for the Assistant General Counsel (R. 12). At this hearing the question was again

fully argued and considered (R. 12). Following this hearing, the Assistant General Counsel promulgated a second ruling dated April 8, 1935 (also unpublished), known as G. C. M. 14774, which was delivered to Deputy Commissioner Bliss in charge of the Miscellaneous Tax Unit. As in the earlier tentative ruling, G. C. M. 14774 set forth the statute, the facts and a discussion of the authorities, but, unlike the earlier ruling, Article 1 of Regulations 67 (the regulations promulgated under the Gift Tax Act of 1924), and Article 3 of Regulations 79 (the first regulations promulgated under the Gift Tax Act of 1932), were set forth in full and considered. After quoting these Regulations, the ruling concluded as follows (R. 21):

"\* \* \* upon a careful consideration of [the arguments advanced] this office is convinced that the Department must adhere to the position that in all such cases the relinquishment or cancellation by the settlor of his right to revest title to the trust property in himself constitutes the gift of the property for gift tax purposes. If the consummation of the gift by vesting title to the property in the donee were to be adopted as the criterion of taxability any such rule would not only be in conflict with the court decisions and regulations cited but, it seems certain, would also lead to many difficulties of an administrative character and otherwise. So far as Sanford was concerned the gift was complete on the date when he relinquished the right to terminate the trusts.

"For the reasons indicated it is the opinion of this office that the gift in the instant case became effective on November 26, 1919, when the said Sanford relinquished his right to terminate the trusts in question and that as this transaction occurred before the gift tax law became effective it is not subject to said tax."

This ruling of April 8, 1935, was signed as before "Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue", with the initials "A.H.K." below, again referring to Arthur H. Kent, who was acting for Mr. Jackson in his absence (R. 21).

Under the same date, namely, April 8, 1935, Mr. Kent addressed a memorandum to Mr. Herman Oliphant, the General Counsel for the Treasury Department (R. 28), sending Mr. Oliphant two copies of the ruling of April 8, 1935, one for himself and one for transmission to the Under Secretary of the Treasury. The concluding paragraph of Mr. Kent's memorandum was as follows:

"I have given the case careful personal attention and sat in on the conference with the attorneys for the trustee and the estate. I am now convinced that the position tentatively taken in the prior opinion should not be maintained, and that its possible prejudicial results upon the revenues both from gift tax and income tax far outweigh the considerable revenue we would gain from asserting a gift tax liability against this trust. Even though we won in the courts, which seems unlikely under the present statutes and regulations, our victory would be a Pyrrhic one."

The Under Secretary of the Treasury, after discussing the ruling with counsel for the Treasury and assuring himself that it had been made with careful consideration of the law, approved the ruling (R. 32, 33).

On April 19, 1935, Sanford's administrator received a letter signed by Deputy Commissioner Bliss, which, after reciting that the gift tax return filed on behalf of the estate had been examined, concluded (R. 29):

"The examination discloses no gift tax lia-

bility. Accordingly, the case has been marked closed in so far as the Federal gift tax is concerned."

*The Decision in Hesslein v. Hoey.*

The case remained closed for some two and a half years. On July 26, 1937, the Circuit Court of Appeals for the Second Circuit handed down its decision in *Hesslein v. Hoey*, 91 F. (2d) 954. The case involved a trust created in 1934, under the terms of which the settlor reserved a power to alter the trust but not in any manner beneficial to himself or his estate. In conformity with the Treasury's final ruling in the *Sanford* case, the Government contended that in the case of a gift in trust the gift tax attached at the point when the settlor surrendered the power to revest in himself income or principal, which in the *Hesslein* case occurred on the creation of the trust. The Circuit Court of Appeals for the Second Circuit nevertheless decided against the Government and sustained the taxpayer, Judge Swan writing for himself and Judge Manton; Judge Augustus N. Hand dissenting with a written opinion.

Following the decision in the *Hesslein* case, the *Sanford* case was reopened. In an unpublished memorandum (R. 29) dated October 14, 1937, known as G. C. M. 19260, the Chief Counsel of the Bureau,† after reviewing the facts in the second *Sanford* ruling (G. C. M. 14774) and reciting that "G. C. M. 14774 gives full effect to the [Commissioner's] regulations", said that inasmuch as the opinion in the *Hesslein* case was contrary to the Commissioner's Regulations issued

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† Between April 8, 1935, when G. C. M. 14774 was promulgated, and October 14, 1937, the title of the chief law officer of the Bureau was changed to "Chief Counsel of the Bureau of Internal Revenue".



under the 1932 Act he had recommended that a petition for certiorari be filed, but since the outcome of such proceedings was still uncertain he advised the issuance of a ninety-day letter, adding that "G. C. M. 14774 is hereby revoked".

The final deficiency letter in this case was issued and delivered to the Sanford Estate a day or two before the running of the statute of limitations.

The Government applied to this Court for a writ of certiorari in the *Hesslein* case, but the application was denied (302 U. S. 756).

Article 1 of Regulations 67 (1924 Edition), the Regulations which underlay the second *Sanford* ruling, has not been changed, but remains in effect, unaltered, today, and represents the official interpretation which the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has placed and still places upon the Gift Tax Act of 1924. The revocation of G. C. M. 14774 was necessary simply as a matter of mechanics in order to permit the issuance of the ninety-day notice in the *Sanford* case, and did not constitute any public or formal change of attitude on the part of the Treasury.

### ***The Departmental Practice.***

The Stipulation of Facts in this case contains the following paragraph (R. 13):

"9. In his administration of the Gift Tax Act of 1924 and the Gift Tax Act of 1932, and prior to the promulgation of the decision in the case of *Hesslein v. Hoey*, 91 Fed. (2) 954, decided July 26, 1937, it has been the uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved to treat the taxable transfer subject to the gift tax as occurring when the transferor re-

linquished all power to revest in himself title to the property constituting the subject of the transfer. It is estimated that approximately 300 cases of such character have been closed or were adjusted in accordance with the above practice."

***The Meager Record in the Hesslein Case.***

Unlike the present record, the record in the *Hesslein* case was very meager. The *Hesslein* case was decided on a motion to dismiss the complaint as insufficient. The Circuit Court of Appeals for the Second Circuit did not have before it (and in denying the Government's application for certiorari this Court did not have before it) the care with which the Treasury considered the question in the *Sanford* case, terminating in the second and favorable ruling; it did not have before it the uniformity of the Commissioner's Regulations since 1924, and the consistent and uniform practice of the Commissioner in administering the Gift Tax Acts; and it did not have before it the illuminating comments made in Congress at the time of the enactment of the Gift Tax Act of 1924, definitely sustaining our interpretation of the statute (see *infra*, p. 37).

***The Decisions Below.***

The Court below did not undertake to fortify its decision by any independent reasoning. After saying that it "favored the view" which we advanced, it concluded, somewhat inconsistently we submit, by adopting the reasoning of the majority opinion in *Hesslein v. Hoey*. In the course of the Court's opinion, Judge Thompson, speaking for himself and Judges Buffington and Davis, said of the *Hesslein* case (R. 177):

"Despite a dissent by one of the Circuit Court

Judges, the Supreme Court denied certiorari (302 U. S. 756). Had it not been for the ruling by the Second Circuit and the action of the Supreme Court in denying certiorari, we would have favored the view that the tax was imposed on the transfer of property and that the transfer took place when the trustee was given such possession that the settlor could not regain it for himself or his estate."

The decision in the *Humphreys* case (set for argument directly following this case) was a *per curiam* opinion, affirming the action of the District Court for the Eastern District of New York on the basis of the *Hesslein* case (101 F. (2d) 1012).

### ***The Errors Alleged.***

1. The Circuit Court of Appeals erred in holding that Sanford's relinquishment on August 21, 1924, of all further power to modify the trusts constituted a taxable transfer in 1924, when in 1919, some five years before, Sanford had unequivocally surrendered any and all power to revest in himself the corpus or income of the trusts.

2. The Circuit Court of Appeals erred in holding that where the settlor of certain trusts surrendered the power of revocation many years prior to the enactment of any Federal Gift Tax Act, retaining only a power to modify which expressly excluded any right to revest in himself income or corpus of the trusts, the surrender of such a power to modify in a subsequent year when a gift tax was in effect constituted a taxable transfer in such subsequent year.

### ***Summary of Argument.***

Since Sanford in 1919 had divested himself of all power to retake for himself income or corpus of the trusts, the surrender in 1924 of the remaining non-beneficial power to modify did not constitute a taxable transfer within the meaning of the Gift Tax Act of 1924.

#### **1.**

The incidence of the gift tax is upon the transfer by the donor and not upon the receipt by the beneficial taker. This is the language of the Gift Tax Act of 1924, and the formal Regulations issued by the Commissioner interpreting the Gift Tax Act of 1924 adopt this rule in the case of gifts in trust subject to reserved powers. The Gift Tax Act of 1932 constituted a reenactment of the earlier law in identical language, thus implying Congressional approval of the Commissioner's 1924 Regulations; and, in addition the 1932 Act incorporated into the statute as a new paragraph the actual language of the Regulations of the Commissioner issued under the 1924 Act. In *Burnet v. Guggenheim*, 288 U. S. 280, 283, this Court, in speaking of the 1924 Regulations, said that "the regulation, and the later statute continuing it, are declaratory of the law which Congress meant to establish in 1924."

#### **2.**

The rule of the decision below is a rule of tax postponement and tax avoidance, and directly at variance with the intention of Congress, implied and expressed.

Whatever the decision in this case, it must necessarily control all future transfers of like character. The transfer occurring on the termination of the grantor's power to revest in himself principal and

income of a trust concededly is an act on which a gift tax may be laid, and accordingly to delay the imposition of the gift tax until the later surrender of the remaining power to modify is, at best, a doctrine of tax postponement. Moreover, under Section 219(g) of the Income Tax Title the burden of paying income taxes shifts from the settlor to the trust estate at the point when the settlor relinquishes "the power to revest in himself title to any part of the corpus of the trust." Consequently, to withhold the imposition of the gift tax at this point and impose it at a later date when the remaining power to modify is surrendered would render the gift tax inharmonious with the income tax provisions and would permit widespread and flagrant income surtax avoidance. It could hardly have been the intention of Congress to have the gift tax applied in a manner productive of such results.

The rule of the Court below does not supplement or protect the estate tax to any greater degree than the rule for which we contend. In the case of a gift in trust, whether the gift tax is imposed at the time the grantor surrenders the right to revest in himself, or, later, when he surrenders the remaining power, under either rule if any power remains outstanding at death an estate tax will be collectible, subject to the statutory credits if a gift tax has already been paid. On the other hand, if all powers are surrendered prior to death, thus excluding the corpus from the estate tax, a gift tax necessarily will have been collected on the full corpus of the trust.

The debates in Congress occurring at the time of the enactment of the Gift Tax Act of 1924 and the House and Senate Committee Reports accompanying the enactment of the Gift Tax Act of 1932 evidence a legislative intent directly in conflict with the decision below.



## 3.

The decisions of this Court in *Burnet v. Guggenheim*, 288 U. S. 280 (1933), and *Porter v. Commissioner*, 288 U. S. 436 (1933), establish the principle for which we contend.

## 4.

The reasoning advanced in the majority opinion in the *Hesslein* case, adopted by the Court below, is fallacious and in conflict with the applicable decisions of this Court.

## ARGUMENT.

**SINCE SANFORD IN 1919 HAD DIVESTED HIMSELF OF ALL POWER TO RETAKE FOR HIMSELF INCOME OR CORPUS OF THE TRUSTS, THE SURRENDER IN 1924 OF THE REMAINING POWER TO MODIFY DID NOT CONSTITUTE A TAXABLE TRANSFER WITHIN THE MEANING OF THE GIFT TAX ACT OF 1924.**

### Preliminary Comments.

Sanford performed three acts with respect to the property in trust which are material, namely, (1) in 1913 he created the trusts, reserving an unrestricted power of revocation and modification; (2) in 1919 he irrevocably divested himself of all power to withdraw principal or income from the trusts, but reserved the right to modify in other respects; and (3) in 1924 he surrendered the remaining right to modify. Concededly at one of these three points Sanford made a transfer of property by way of gift. This Court has already held that the taxable transfer did not occur on the creation in 1913 of the revocable trusts. *Burnet*

v. *Guggenheim*, 288 U. S. 280 (1933). The question is thus narrowed down to whether the transfer susceptible of sustaining a gift tax occurred on November 26, 1919, or on August 21, 1924.

The *Guggenheim* case† arose under the Gift Tax Act of 1924, and involved a trust originally revocable but later made irrevocable by the surrender of the reserved power. The power reserved and later surrendered was a power "to revoke, modify or alter". We shall discuss the *Guggenheim* case at greater length (*infra*, p. 41), for we respectfully suggest that in principle the decision controls the case here. But the important point is that Mr. Justice Cardozo, who wrote for the Court, laid down certain fundamental principles which are applicable generally to all cases of gifts in trust. "Congress", he said, "did not mean that the tax should be paid twice, or partly at one time and partly at another.". And again, "There must be a choice, and a consistent choice, between the one date and the other. To arrive at a decision, we have therefore to put to ourselves the question, which choice is it the more likely that Congress would have made?" In selecting the date when the power of revocation was surrendered rather than the date when the revocable trust was created, Mr. Justice Cardozo concluded that the statute "is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall."

Thus Mr. Justice Cardozo made it abundantly clear that in the case of a gift in trust one gift tax and only one is imposed, and that in selecting the date "a choice, and a consistent choice" must be made. The question is "which choice is it the more likely that

† See page 41, *infra*, for a statement of the case.

Congress would have made?" The question is not one of Congressional power; it is a question of the intention of Congress, and in resolving it the intention of Congress must control.

In approaching the question, the possibility of a shifting of interest among the beneficiaries on account of the existence of the limited power to modify must not be confused with the validity of the gifts as such. The trusts here involved, the trust involved in the *Hesslein* case, and the trust involved in the *Humphreys* case were all valid and enforceable trusts; none of them failed for the lack of a donee, namely, the trustee representing the trust estate, capable of taking, holding and administering the trust corpus. Once the grantor surrendered all power to revest in himself the principal and income of the trusts, there was a finality of transfer and a reality in the gift, which was entirely lacking so long as the power to revoke remained outstanding.

Nevertheless, the Court below, on the reasoning in the *Hesslein* case, in effect concluded that it was not the intention of the statute to impose a tax until the gift was "complete", and that a gift in trust is not "complete" until the surrender of the power to change the beneficial takers. This in effect amounts to saying that Congress in laying the tax on gifts did not intend to impose it upon the *transfer* of the property from the donor, but intended, rather, to withhold the tax until the ultimate beneficial takers were finally fixed.

## I.

The incidence of the gift tax is upon the transfer by the donor and not upon the receipt by the beneficial taker; and in the case of gifts in trust the taxable transfer occurs on the surrender of the power to re-take.

## THE STATUTE.

The language of Section 319 of the Revenue Act of 1924 imposing the tax on gifts is clear and unambiguous:

“ \* \* \* a tax \* \* \* is hereby imposed upon the transfer \* \* \* by gift \* \* \* of any property \* \* \* ”

Thus the expressed incidence of the tax is upon the transfer by the donor and not upon the receipt by the ultimate beneficial taker. Clearer language is hardly conceivable. Short of adding a negative clause such as “and not upon the receipt of the property”, it is hard to imagine language which could more clearly impose the tax upon the transfer as distinguished from the receipt.

By Section 324 it was expressly provided that the tax “shall be paid by the donor”, thus confirming the intention of laying the tax on the transfer rather than on the receipt.

Clearly the tax is an excise on the right of making a “transfer” by way of gift.

## THE COMMISSIONER'S REGULATIONS.

The language of Section 319 does not cover in terms gifts in trust. But from the enactment of the statute in 1924, the Commissioner of Internal Revenue consistently has interpreted the statute as applicable to gifts in trust in accordance with the language of

transfer, and has imposed the tax at the point where the grantor irrevocably parts with the property, terminating all power to revest in himself title to the corpus of the trust.

On November 8, 1924, the Commissioner of Internal Revenue, in pursuance of his authority to issue "all needful rules and regulations for the enforcement of this Act",† promulgated his formal regulations covering the case of gifts in trust. These comprise Article 1 of Regulations 67 (1924 edition) (See Appendix, p. 64, *infra*). Article 1 provides that on the creation of a trust "where the grantor retains the power to revest in himself title to the corpus of the trust" no gift subject to tax occurs, but—

"Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated."

Thus in the very atmosphere which attended the passage of the Gift Tax Act, the Commissioner of Internal Revenue placed an interpretation upon the Act which clearly and succinctly and without ambiguity prescribed the rule for which we contend.

The Chief Counsel for the Bureau of Internal Revenue has so construed the Commissioner's Regulations. In the second *Sanford* ruling (G. C. M. 14774), he quoted Article 1 of Regulations 67 and laid his opinion squarely upon the Regulations. Again, in G. C. M. 19260, the memorandum directing the issuance of the 90-day letter following the decision in the *Hesslein* case, the Chief Counsel specifically said (R. 30): "G. C. M. 14774 gives full effect to the regulations." Nor could he have said otherwise, for

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† See Section 1001 of the Revenue Act of 1924.



if, as the Regulations provide, the tax attaches "Where the power retained by the grantor to revest in himself title to the corpus is \* \* \* terminated", it must necessarily attach on the occurrence of the prescribed event, regardless of the retention or non-retention of another kind of power. Article 1 of Regulations 67 is clear and unambiguous.†

Article 1 of Regulations 67 (1924 edition) remains in full force and effect, unaltered and unamended, even to this day. ♥

### LEGISLATIVE APPROVAL OF THE REGULATIONS.

The permanence of this Regulation is not surprising, for the rule of the Regulation has received explicit Congressional approval, as evidenced, first, by the reenactment of the Gift Tax Act of 1932 in the same language as the 1924 Act, and, second, by the incorporation in the later statute of a new section (Section 501(c)) which expressly adopted the language of the 1924 Regulation.

With Article 1 of Regulations 67 (1924 edition) formally promulgated and outstanding, Congress in 1932 reimposed the tax on gifts, and in doing so used the same language as in Section 319 of the 1924 Act. Section 501(a) of the 1932 Act laid—

"\* \* \* a tax \* \* \* upon the transfer \* \* \* of property by gift \* \* \*."††

† The Court below, after quoting this Article, said (R. 176-7): "This is a negative provision that the gift is not completed if the settlor retains the power to revest the corpus of the trust in himself." On the contrary, we submit that the regulation constitutes an affirmative declaration, for it unequivocally states that the taxable transfer "will be treated as taking place in the year in which such power is terminated".

†† The language of the 1924 Act was:

"\* \* \* a tax \* \* \* upon the transfer \* \* \* by gift \* \* \* of any property."

But in order that all doubt might be removed as to its intention to adopt the rule of the earlier Regulations, Congress incorporated into the 1932 Act a new section, Section 501(c). This section provided:

“(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, \* \* \*.”

This was the situation when this Court considered the application of the Gift Tax Act of 1924 to the case of a gift in trust in the *Guggenheim* case. In the course of his opinion, Mr. Justice Cardozo considered with care Article 1 of Regulations 67 (1924 edition) and the incorporation of the language of this Regulation in Section 501(c) of the Revenue Act of 1932. After quoting Article 1 of Regulations 67, he said (p. 283):

“The substance of this regulation has now been carried forward into the Revenue Act of 1932, which will give the rule for later transfers [citing Section 501 (c) of the Revenue Act of 1932].”

and he then added:

“We think the regulation, and the later statute continuing it [*i. e.*, Section 501 (c) of the 1932 Revenue Act], are declaratory of the law which Congress meant to establish in 1924.”

Following the decision of this Court in the *Guggenheim* case, and in fact directly on account of the statements made by Mr. Justice Cardozo, Congress repealed Section 501(c) of the Revenue Act of 1932† as no longer necessary. In the House Ways and Means Committee Report and in the Senate Finance Committee Report accompanying the Revenue Bill of 1934, the two committees said:††

“This section repeals section 501 (c) of the Revenue Act of 1932, since the principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court’s decision in the *Guggenheim case* (53 S. Ct. 369).”

In the face of such a record, it is hard to conceive of a clearer case of legislative approval of the rule prescribed by the Commissioner in his Regulations.

### THE 1932 REGULATIONS.

The Regulations of the Commissioner issued under the Revenue Act of 1932 adopted and continued the rule of the 1924 Regulations. Article 3 of Regulations 79 (1933 edition), as in the case of the 1924 Regulations, provided that—

“The relinquishment or termination \* \* \* of the power to revest in the donor title to property transferred in trust, is a gift of such property at the time of the relinquishment or termination of the power \* \* \*.”

These were the Regulations which were before the Second Circuit in the *Hesslein* case. Conceding that

† See Section 511 of the Revenue Act of 1934.

†† House Report No. 704, 73d Cong., 2d Sess., p. 40; Senate Report No. 558, 73d Cong., 2d Sess., p. 50.

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they squarely covered the case involved, Judge Swan nevertheless ignored them on the ground that they were "of recent adoption and have not the sanction which would result from a subsequent reenactment of the statute". If Judge Swan had been conscious of the permanency of the rule since 1924 and of its history, he hardly could have made such a comment.

Subsequently, the Commissioner amended and amplified Article 3 of Regulations 79 in the 1936 edition. But the fundamental rule involving transfers in trust was retained and continued.

#### THE DEPARTMENTAL PRACTICE CONSISTENTLY AND UNIFORMLY APPLIED FOR SOME THIRTEEN YEARS.

As a matter of administration practice, from the enactment of the Gift Tax Act on June 2, 1924, until the *Hesslein* decision was announced in 1937, the Commissioner never departed from the rule announced in his formal Regulations in adjusting individual cases of this character, including this very case itself.

The stipulated facts of record unqualifiedly testify to the uniform and uninterrupted course of the departmental practice (R. 13-14). In his administration of the Gift Tax Acts of 1924 and 1932, reads the stipulation, and up until the time the Circuit Court of Appeals for the Second Circuit decided the *Hesslein* case on July 26, 1937, it has been the "uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved" to treat the taxable transfer subject to the gift tax as occurring when and only when "the transferor relinquished all power to revest in himself title to the property constituting the subject of the transfer";



and approximately 300 cases of this character, so recites the stipulation, have been closed or were adjusted in accordance with this practice.

### THE AUTHORITIES.

Under the established rule of the decisions of this Court, such a uniformity in published formal regulation and departmental practice as is presented in this case will not be disturbed unless clearly inconsistent with the language of the statute. *Hassett v. Welch*, 303 U. S. 303, 312 (1938); *Logan v. Davis*, 233 U. S. 613, 627 (1914); *United States v. Moore*, 95 U. S. 760, 763 (1877); *Dismuke v. United States*, 297 U. S. 167, 174 (1936); *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315 (1933); *United States v. Alabama Railroad*, 142 U. S. 615, 621 (1892); *Brewster v. Gage*, 280 U. S. 327, 336 (1930); *Fawcus Machine Co. v. United States*, 282 U. S. 375, 378 (1931).

Where Congress, has reenacted the statute without alteration following the promulgation of the formal Regulation, the administrative interpretation placed upon the Act is of even more compelling weight, for, as this Court said in *Massachusetts Mutual Life Insurance Company v. United States*, 288 U. S. 269, 273 (1933) (an income tax case) the action of Congress—

“was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute.”

In *Koshland v. Helvering*, 298 U. S. 441, it was said (p. 445):

"We give great weight to an administrative interpretation long and consistently followed, particularly when the Congress, presumably with that construction in mind, has reenacted the statute without change."

Perhaps the most forceful application of the principle appears in *Helvering v. Reynolds Tobacco Co.*, 306 U. S. 110, decided during the last term of this Court. The *Reynolds Tobacco Co.* case involved the question whether a corporation realizes gain or loss on the purchase and sale of its own stock. From 1920 to 1934, the administrative construction placed upon the applicable provision of the revenue laws as set forth in the Regulations of the Commissioner was uniform and consistent. In 1934, the Commissioner changed the Regulations retroactively. In upholding the interpretation adopted in the original Regulations, this Court announced the rule that since such Regulations had received legislative approval by reenactment of the underlying statutory provisions, the Regulations had the force of law and, therefore (p. 116)—

"\* \* \* Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed."

The principle underlying the *Reynolds Tobacco Co.* case is even more persuasive here, since the Commissioner has never undertaken to change or modify his Regulations promulgated under the Gift Tax Act of 1924, but such Regulations remain outstanding today, unaltered and unamended.

To delay the gift tax until the surrender of the limited power to modify, as the Court below has

decreed, is to ignore the force and effect of an unambiguous Regulation and the consistent administrative practice followed for thirteen years; to ignore the clear legislative approval of the Regulation by the enactment of the second Gift Tax Act without change of language and the deliberate and express incorporation in that Act of the language of the Regulation; and to ignore the statement of this Court in the *Guggenheim* case (p. 283) that "the regulation, and the later statute continuing it, are declaratory of the law which Congress meant to establish in 1924".

## II.

**The rule of the decision below is a rule of tax postponement and tax avoidance, and directly at variance with the intention of Congress, implied and expressed.**

Whichever rule is adopted in this case must necessarily control all future transfers of similar character.

The Gift Tax Act of 1924 was the first Federal Gift Tax Act. It was approved June 2, 1924, and was repealed as of December 31, 1925. The tax on gifts was reenacted as part of the Revenue Act of 1932. The second Act went into effect on June 6, 1932, and since has remained in effect. While somewhat tardy in its permanent arrival, the Federal tax on gifts is now a component part of our system of Federal taxation. In the Federal scheme there are, therefore, three main classes of taxes, the income tax, the estate tax and the gift tax. Since each is a component part of the larger whole, all must be interpreted and applied together, for otherwise loopholes will occur and inconsistencies arise.

The rule of the Court below, if adopted, would

result in tax postponement and tax avoidance. It would result in unnecessarily postponing the taxes on gifts, if not wholly frustrating such taxes; and unquestionably it would result in widespread and flagrant avoidance of Federal income taxes. Surely it could not have been the intention of Congress to have the Gift Tax Act interpreted in such a manner.

(a)

THE RULE OF THE COURT BELOW WOULD POSTPONE, IF NOT WHOLLY FRUSTRATE, THE COLLECTION OF GIFT TAXES.

Concededly the transfer occurring when a grantor surrenders the power to revest in himself income or corpus of a trust is a transfer which will support the imposition of a gift tax, even though the grantor retains a limited power to modify in other respects. But if the taxing power of the Government is withheld and a gift tax is not imposed until the surrender of the remaining power, undeniably postponement and presumably frustration of the tax on gifts will occur. Where a taxpayer desires to make a gift without subjecting himself to the burden of the gift tax, it does not require a very discerning eye for him to see that he may do so by the simple device of creating a trust, under the terms of which he retains a bare power to modify except in favor of himself or his estate, which power he need never surrender nor exercise. It would be strange, indeed, if Congress intended to legalize such a device, when the imposition of the gift tax at the time of the earlier relinquishment of the power to revest would definitely prevent it.

(b)

THE RULE OF THE COURT BELOW IS INHARMONIOUS WITH THE INCOME TAX PROVISIONS OF THE REVENUE ACTS, AND WOULD RESULT IN WIDESPREAD INCOME TAX AVOIDANCE.

The Gift Tax Act of 1924 was enacted as Part II of Title III of the Revenue Act of 1924. The income tax provisions were Title II. By imposing the gift tax on "the transfer \* \* \* of any property" (as distinguished from the receipt), Congress brought the gift tax provisions and the income tax provisions into complete harmony in respect of trusts subject to reserved powers. In the 1924 Act, the Income Tax Title was amended by adding a new section, 219(g), which read as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, *the power to revest in himself title to any part of the corpus of the trust*, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." (Italics supplied.)†

That is to say; in the case of a trust, where the grantor retains "the power to revest in himself title to any part of the corpus of the trust", the income of the trust, although received by someone other than the grantor, nevertheless, is taxable to the grantor. The principle justifying such a rule is that on ac-

† In drafting the 1924 Gift Tax Regulations, the Commissioner had before him the language of this new income tax section, and unquestionably was aware of the considerations implicit in the two Titles of the Act.



count of the reserved power, the grantor can at any time retake the corpus and hence exercises complete control for himself over the income. *Corliss v. Bower*, 281 U. S. 376.

On the other hand, under the clear implication of the language of Section 219(g), when the grantor ceases to have "the power to revest in himself title to any part of the corpus of the trust", the burden of paying the income tax in respect of the income from the trust shifts from the grantor to the trust estate and falls either upon the beneficiaries or upon the trustee, a rule which has been consistently applied by the courts and the Board of Tax Appeals. *Knapp v. Hoy*, 24 Fed. Supp. 39, affirmed C. C. A. 2nd C., May 22, 1939, 104 F. (2d) 99; *Phebe W. M. Downs*, 36 B. T. A. 1129; *Thomas H. Blodgett*, 37 B. T. A. 1333 (Memo. Dec. reported in 1938 Com. Cl. H. Dec. 10004-B, p. 26080).

Thus, for income tax purposes, the test is the existence or absence of the grantor's control over the corpus (and hence the income) for himself.

This being the income tax rule, if the gift tax is postponed until the surrender of a limited power of modification, the gift tax is entirely out of harmony with the income tax and will result in flagrant and widespread income tax avoidance. Under such a rule, any wealthy individual may readily relieve himself of burdensome surtaxes by the simple device of making gifts in trust for members of his immediate family or friends, in which he relinquishes the power to revest in himself income and principal but reserves a limited power to modify, such as the power to change beneficiaries, which, of course, need never be exercised nor surrendered. Thereby he shifts the burden of paying the income tax from himself to

the trust estate, thus effecting a saving of income taxes by reducing the rates applicable, and at the same time he faces no gift taxes so long as the retained power remains outstanding.

This very case has already arisen in *Knapp v. Hoey, supra*, (the District Court for the Southern District of New York). In 1929, Knapp created a trust, reserving broad powers to change the beneficiaries and to modify their interests, but "in no event shall any such modification or alteration direct that the said income be paid to or applied to the use or benefit of the party of the first part [the grantor]." With the *Hesslein* case before him, the Commissioner attempted to tax Knapp on the income from the trust received in 1932. Judge Patterson, then still on the District Court bench, finding that "the trust was not revocable" and that "no power was reserved by the grantor to revest in himself title to any part of the corpus"; held that Knapp was not liable for the tax, adding (p. 41):

"It requires no great discernment to see that the plaintiff in setting up this trust had an eye on the revenue laws. While he went far in retaining control of the property, he stopped short of control broad enough to render the income taxable as his own. The fact that the creation of the trust was a plan for reducing his income tax and at the same time retaining a measure of control over the property does not make the income of the trust taxable as his income under existing laws."

The Circuit Court of Appeals for the Second Circuit affirmed, Judge Augustus N. Hand writing for himself and Judges Learned Hand and Swan. The Circuit Court laid its decision squarely upon the

principle that under the terms of the trust the settlor was powerless to retake income or principal for himself, saying:

"The clause just quoted would prevent the settlor from exercising his power so as to acquire income whether directly or indirectly in violation of the purpose of the prescribed limitation. Cf. *Higgins v. White*, 93 F. (2d) 357 (CCA1)."

The Court did not refer to its earlier decision in the *Hesslein* case.

The Government did not apply for a writ of certiorari in the *Knapp* case.

Thus under the rule of the Court below, by the simple device of an irrevocable gift in trust subject to a reserved power to change the beneficiaries, a wealthy individual may make substantial and irrevocable transfers to his family or friends and thus accomplish very large income tax savings, without facing any deterrent in the form of an immediate gift tax. Unquestionably such a rule would result in flagrant income tax avoidance and render the gift tax largely unproductive of revenue.†

The Treasury, in considering the *Sanford* case, was quick to see the magnitude of such a loophole. In submitting the second and favorable *Sanford* rul-

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† If the rule of the Court below should be finally established, even Congress would not be able effectively to close the loophole. It might, of course, undertake to amend the Gift Tax Act and make it in terms apply at the point when the grantor no longer can retake for himself the property (the rule for which we here contend); but any such change could not be made retroactive. *Nichols v. Coolidge*, 274 U. S. 531 (1927), *Untermeyer v. Anderson*, 276 U. S. 440 (1928), *Helvering v. Helmholz*, 296 U. S. 93 (1935). On the other hand, any amendment of Section 219(g) undertaking to impose income taxes on the grantor after he has lost the right to retest in himself corpus or income would be

ing (G.C.M. 14774) to the Under Secretary of the Treasury, a high Treasury official wrote (R. 28):

"I am now convinced that the position tentatively taken in the prior opinion should not be maintained, and that its possible prejudicial results upon the revenues both from gift tax and income tax far outweigh the considerable revenue we would gain from asserting a gift tax liability against this trust."

If, however, the gift tax is imposed when the power to revest is surrendered, that is, at the point when the burden of the income tax shifts from the grantor to the trust estate, benefit will be combined with burden, and the gift tax and the income tax will be brought into complete harmony.

(c)

THE RULE OF THE COURT BELOW DOES NOT SUPPLEMENT OR PROTECT THE ESTATE TAX TO ANY GREATER DEGREE THAN THE RULE FOR WHICH WE CONTEND.

In framing the Revenue Act of 1924, Congress added a new section to the estate tax provisions, namely, Section 302(d). Under this amendment, the

beyond the power of Congress. As the Government said in its brief in the Court below (p. 37):

"In order to justify taxing the grantor on income of a trust which is not in terms payable to him, it is obvious that he must have command of the trust corpus or of the trust income for his own use or for a use which satisfies one of his obligations. *Douglas v. Willcuts*, 296 U. S. 1; *Corliss v. Bowers*, 281 U. S. 376. That was the precise theory upon which *Knapp v. Hoey* (S. D. N. Y.), reported in 1938 C. C. H., Vol. 4, Par. 9368, was decided. A tax cannot constitutionally be imposed on one person with respect to income which belongs wholly to another (*Poe v. Seaborn*, 282 U. S. 101; *Hooper v. Tax Commission*, 284 U. S. 206)."

gross estate of a decedent must include the value at the time of his death of all property—

“(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;”

Thus under the statute as it now exists, for estate tax purposes a transfer in trust subject at death to a reserved power “to alter, amend or revoke” is part of the gross estate. Construing this Section, this Court has held that the quoted phrase is disjunctive, and that where the grantor at death retains only a non-beneficial or limited power to alter in favor of others (as distinguished from a power to revest in himself), the corpus of the trust nevertheless must be included in the gross estate. *Porter v. Commissioner*, 288 U. S. 436.†

This being the state of the law, the gift tax will supplement and protect the estate tax equally well, whether the gift tax is imposed when the grantor relinquishes the right to revest in himself the principal

† In the course of its opinion in the *Porter* case, this Court pointed out (p. 442) that prior to the enactment of Section 302(d) covering transfers subject at death to a power “to alter, amend or revoke”, it had already held that the existence at death of a power of revocation over a trust required the inclusion of the corpus in the gross estate within subdivision (c) taxing “transfers” intended to take effect on death, citing *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 345. Accordingly, (c) and (d) overlap to the extent that both cover transfers subject to a power of revocation. Subdivision (d) goes beyond (c) in including a transfer subject to a non-beneficial power to alter or amend.



and income, or, at the later date, when he relinquishes the remaining power to alter or modify. In the case of the creation of an *inter vivos* trust, if any power remains outstanding at death, whether a power of revocation and revestment, or merely a limited power to alter or amend, the trust corpus will fall within the gross estate for estate tax purposes under the provisions of Section 302(d), subject, however, to the statutory gift tax credits prescribed in Section 322 of the Revenue Act of 1924 in the event of the payment of a prior gift tax. If, however, no power remains outstanding at death, that is to say, if prior to death all power over the disposition of principal and income has been surrendered, the corpus is not a part of the gross estate. But, under such circumstances, a gift tax necessarily must have been paid prior to the point when the property was removed from the scope of the estate tax, regardless of whether the gift tax is imposed at the time of the surrender of the power to revest, or, later, on the surrender of the remaining power to modify. Accordingly, whichever the choice may be as to the date on which the gift tax is imposed, the gift tax will implement the estate tax equally well, for in either case, the collection of a gift tax on the full corpus of the trust is assured before the corpus is excluded from the gross estate.

(d)

THE DEBATES IN CONGRESS OCCURRING AT THE TIME OF THE ENACTMENT OF THE GIFT TAX ACT OF 1924 EXPRESSLY EVIDENCE A LEGISLATIVE INTENT DIRECTLY IN CONFLICT WITH THE DECISION BELOW.

In drafting the Revenue Bill of 1924, the Ways and Means Committee of the House, led by Representa-

tive Ogden Mills, defeated an effort of Representative Green, Chairman of the Committee, to include in the Bill any gift tax provisions. Similarly, when the Senate Finance Committee was considering the Bill, the effort of Senator Walsh of Massachusetts to include a gift tax provision was defeated in committee. But when the Revenue Bill of 1924 was introduced on the floor of the two Houses, Representative Green in the House and Senator Walsh in the Senate introduced an amendment which ultimately was enacted as the Gift Tax Act of 1924, and in the course of the debates on the Revenue Bill in the House and Senate, Representative Green, Senator Walsh, and Representative (now Vice President) Garner, also an earnest advocate of the bill, repeatedly made statements which indicate clearly the purpose of Congress in enacting the gift tax provisions.

Statements on the floor of the House and Senate by those sponsoring a measure, particularly where, as here, the bill which later became law was introduced as an amendment when the main bill reached the floor of the two Houses, are entitled to weighty consideration in determining the intention of Congress. *Hassett v. Welch*, 303 U. S. 303, 312 (1938); *Wright v. Vinton Branch*, 300 U. S. 440, 463 (1937); *Humphrey's Executor v. United States*, 295 U. S. 602, 625 (1935); *Richbourg Motor Co. v. United States*, 281 U. S. 528, 536 (1930); *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 475 (1921). In *Wright v. Vinton Branch*, *supra*, this Court said in part (footnote, pp. 463-4):

"Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to reports of Congressional committees which have considered the measure, \* \* \*; to exposition of the bill on the floor of Congress by those in

charge of or sponsoring the legislation, \* \* \*; to comparison of successive drafts or amendments of the measure, \* \* \*; and to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology, \* \* \*."

Fortunately, those sponsoring the new gift tax amendment made abundantly clear the major purposes of Congress in enacting such legislation. Representative Green, in offering the bill on the floor of the House, stated that the proposed amendment taxing gifts was a corollary of the estate tax necessary to prevent estate tax avoidance, and then continued (65 Cong. Rec., 1st Sess., 3120):

"This amendment also is needed on account of the income tax. The splitting up of large estates, of course, reduces the amount of surtaxes to be laid upon the party who so divides them. We have lost more, in my judgment, by the division of these large estates in our income taxes than we have lost by reason of tax-exempt securities, and we have lost millions upon millions by reason of tax-exempt securities."

And again he said (65 Cong. Rec., 1st Sess., 3172):

"\* \* \* I have been laboring to get it [the gift tax] inserted in the law, because I knew just exactly what would happen, namely, that these big estates would be gradually split up into different parts, thereby defeating both the income tax and the inheritance tax, and that is the reason our revenues are so rapidly decreasing from the big estates."

Representative Garner said in the course of the debate (65 Cong. Rec., 1st Sess., 3173):

"The gentleman from New York [Ogden Mills] knows that this amendment if it is adopted will

prevent the transferring of large estates and avoiding paying estate taxes, that it will prevent the dividing up of large estates, and therefore escape from the high surtaxes. Those are the two things it will do, and in doing that in my opinion it will raise twenty-five million dollars in the Treasury next year."

Senator Walsh, who introduced the gift tax bill on the floor of the Senate, said (65 Cong. Rec., 1st Sess., 8095, 8096):

"The gift tax would serve as a safeguard for two important sections of this bill, namely, the estate tax and the personal income tax. It will go a long way toward preventing evasion of both of those taxes by the transfer of possession to relatives or friends for the purpose of reducing incomes or estates so as to bring them within a tax bracket where they would be subject to lower tax rates.

\* \* \* \* \*

"The purpose of gifts inter vivos is to lower the income tax by splitting up the volume of the taxable property.

\* \* \* \* \*

"Mr. President, I wish to say a few words further in order to illustrate the manner in which gifts are used to evade income and inheritance taxes.

Suppose Jones enjoys the income from \$1,000,000, or \$50,000 per year. The normal tax and the surtax at the rates adopted by the Senate are \$6,137.50. If Jones gives his wife half of his property, or \$500,000, in trust or otherwise, the income taxes on the \$25,000 of income which each spouse will receive will be \$1,547.50, or a total saving in taxes on the income of the husband and wife of \$3,042.50. The saving in the

cases of larger incomes will be proportionately greater as the surtaxes increase. It can not be doubted, therefore, that if we are to make the tax laws effective, we must place some tax upon the gifts which are now being used to evade them."

Senator Simmons of North Carolina in the course of the debate also said (65 Cong. Rec., 1st Sess., 8096):

"There are two kinds of taxes which we find it necessary to levy in the conditions which now obtain. One is the income tax, the other is the inheritance tax. From both of those taxes the Government realizes a very large amount of revenue, revenue that it can not dispense with, that is absolutely necessary to enable us to finance the Government. One of the favorite methods of evading the income tax is through the splitting up of large incomes among members of the family, thus evading the higher rates imposed by surtaxes. That has been very generally resorted to especially by men of large incomes and the Government has lost an immense amount of revenue through that means of evasion."

While general in character, these comments did not overlook the effect of accomplishing gifts by the creation of trusts, for Senator Walsh of Massachusetts in the course of formulating his example of reducing income taxes by making a gift to a wife, quoted above, referred to the suggested gift as "in trust or otherwise".

Again, when the Revenue Bill of 1932 was reported out of Committee, the Committee Reports of both Houses† contained the following statement:

"The gift tax will supplement both the estate

† House Rep. No. 708, 72nd Cong., 1st Sess., p. 28; Sen. Rep. No. 665, 72nd Cong., 1st Sess., p. 40.



tax and the income tax. It will tend to reduce the incentive to make gifts in order that distribution of future income from the donated property may be to a number of persons with the result that the taxes imposed by the higher brackets of the income tax law are avoided. It will also tend to discourage transfers for the purpose of avoiding the estate tax."

This expressed purpose in the enactment of the statute and the very apparent need for harmonizing the gift tax and the income tax did not escape the Commissioner of Internal Revenue. As we have seen (pp. 19-20, 29, *supra*), when the Commissioner came to draft his Regulations covering transfers in trust under the 1924 Act, he adopted a rule under which the gift tax was imposed at the point where the burden of paying income taxes shifted from the grantor to the trust estate, thus making the gift tax operate as a very real deterrent against splitting up large property holdings and so carrying out one of the expressed purposes of Congress in exacting the gift tax as applied to transfers in trust; and in order that there might be no escape from this result, he adopted the actual language of the income tax provisions. He would have been derelict in his duty had he done otherwise. Yet the Court below has repudiated the rule which the Commissioner so carefully framed, and has prescribed a rule which in its operation will defeat one of the declared purposes of Congress in imposing a tax on gifts.

## III.

The decisions of this Court in *Burnet v. Guggenheim* and *Porter v. Commissioner* establish the principle for which we contend.

Judge Swan in his opinion in the *Hesslein* case undertook to distinguish *Burnet v. Guggenheim*, 288 U. S. 280, and relied upon *Porter v. Commissioner*, 288 U. S. 436, as sustaining his contention that a gift in trust is not "complete" so long as a power to change beneficiaries remains outstanding. We approach with some diffidence the discussion of cases so recently decided by this Court, but we differ so sharply with the interpretation placed upon them by the majority opinion in the *Hesslein* case that some discussion of the cases seems imperative.

### *The Guggenheim Case.*

The decision below is, we submit, in conflict with the *Guggenheim* case; the reasoning of the case, certainly, impels the rule for which we here contend.

Guggenheim created a trust on June 28, 1917, reserving an unrestricted power "to modify, alter or revoke the trusts except as to income, received or accrued." By indenture dated July 19, 1925, Guggenheim surrendered the reserved power. The specific question this Court had before it and decided was whether a transfer subject to the gift tax occurred on the creation of a trust subject to an absolute power to revoke, or later, upon the surrender of such a power. This Court held that in applying the Gift Tax Act substance must control over form, that while the power of revocation remained outstanding the gift was "formal and unreal", that the

transfer did not acquire substance and reality so long as the grantor "was free at any moment, with reason or without, to revest title in himself", and accordingly concluded that the tax attached on the surrender of the reserved power.

Mr. Justice Cardozo focused his attention wholly on the power to revoke and its surrender. In every instance when the Learned Justice made reference to the character of the power, he described it as a "power of revocation" or "the power to revest title in himself", or "irrevocable deed", and such like, and when at the outset of his opinion he posed the question under consideration, he phrased it as follows (p. 281):

"The question to be decided is whether deeds of trust made in 1917, with a reservation to the grantor of a power of revocation, became taxable as gifts under the Revenue Act of 1924 when in 1925 there was a change of the deeds by the cancellation of the power."

He said that when the settlor executed the original deed of trust he divested himself of title to the property and transferred it to others. But, he continued (p. 284):

"\* \* \* the substance of his dominion was the same as if these forms had been omitted. *Corliss v. Bowers* [281 U. S. 376], *supra*. He was free at any moment, with reason or without, to revest title in himself, except as to any income then collected or accrued. As to the principal of the trusts and as to income to accrue thereafter, the gifts were formal and unreal. They acquired substance and reality for the first time in July, 1925, when the deeds became absolute through the cancellation of the power."

That is to say, it is the relinquishment of the power of revocation which in reality constitutes the gift, and at that point there occurs "the transfer \* \* \* of \* \* \* property", which is the incidence of the gift tax.

Later in the course of his opinion Mr. Justice Cardozo said (p. 286):

"The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate *until put beyond recall.*" (Italics supplied.)

The clause "put beyond recall" can mean only one thing, the transfer of the property in such a fashion that the grantor under no circumstances can "recall" the property. This is the same conception as that of the words in the Commissioner's Regulations: "to revest *in himself* title to the corpus of the trust". If, as the Learned Justice said, "a gift is not consummate until put beyond recall", the implication is equally clear that *when put beyond recall* the taxable transfer occurs.

The illusory character of a gift subject to a power of revocation runs through the whole opinion and underlies the decision itself. For example, the Learned Justice said (p. 288):

"To lay the tax at once, while the deed is subject to the power, is to lay it on a gift that may never become consummate in any real or beneficial sense. To lay it later on is to unite benefit with burden."

The point when a gift is consummate in a "real or beneficial sense" is the point when the grantor cannot retake it, when it is "put beyond recall", when

it cannot be destroyed. This occurs on the surrender of the power of reversion, for then there is a complete finality of the gift. That the grantor still may shift the beneficial enjoyment is of no consequence for our purposes. Such a power is a special power in trust,<sup>†</sup> and forever insures the enjoyment of the property by someone *other than the grantor*. *Knapp v. Commissioner, supra* (p. 31). In the case of an ordinary trust with contingent remainders, unquestionably the gift is a valid and effective gift even though the contingencies are not determined. The same principle applies here.

In the course of his opinion, Mr. Justice Cardozo made certain comments which were misinterpreted by the Circuit Courts of Appeals in these cases. He said (pp. 285-6) that the imposition of a gift tax upon the value of the trust corpus would be a hardship "when nothing has been done to give assurance that any part of the principal will ever go to the donee". In relying upon this statement, the Circuit Courts overlooked the fact that this Court was considering a *revocable* trust, and that the statement was addressed to the contention that a completed gift occurred on the *creation* of a revocable trust. Clearly the statement was not aimed at, and it cannot properly be applied to, a case where the trust has become *irrevocable* by the settlor's surrender of all power to reversion in himself income or corpus. In the one case there is in reality no permanent donee, for by exercising the power of revocation the grantor may undo everything that he has done. But after a grantor has surrendered the power to reversion corpus and income in him-

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<sup>†</sup> See New York Real Property Law, §§ 135, 138, and 144 (applicable equally to personal property, *Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 N. Y. 295).



self, the transfer is final and permanent and a final and permanent donee exists, namely, the trust estate. In such a case, the payment of the tax upon the surrender of the power to re-vest creates no hardship, whether the tax is collected from the donor or, on the donor's inability to pay, from the trust estate. There exists a definite and final donee and a definite and completed gift in trust, regardless of the power to designate new beneficiaries, since the power cannot be exercised in favor of the grantor and the gift thus destroyed.

Mr. Justice Cardozo also said that the gift tax and the estate tax are closely related in structure and purpose, are parts of the same title, and are in *pari materia*. From the context of this statement in the opinion, it is evident, however, that it was made in support of his assertion that the gift tax, like the estate tax, should not be applied so as to exalt form over substance, for directly after making this comment, he said (p. 287):

"There is little likelihood that the lawmakers meant to narrow the concept, and to revert to a construction that would exalt the form above the substance, in fixing the scope of a transfer for the purposes of Part II."

And later he added (p. 287):

"Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title."

In the case of gifts in trust, as he himself makes clear, the change of the economic benefits occurs when the grantor loses the power to retake the corpus and income for himself, for at that point there is a per-

manent shift of the economic benefits from the grantor to persons other than the grantor. The permanence in this shift of economic benefits is not affected by the retention of a non-beneficial power to modify, for while under the power the grantor may redesignate the recipients of his bounty, the gift can neither be recalled nor destroyed.

Quoting Mr. Justice Cardozo's statement that the two taxes are closely related in purpose and structure and are in *pari materia*, Judge Swan in the *Hesslein* case gave to it quite a different implication. From it he concluded that the gift tax and the estate tax should be construed together in the sense that since the estate tax embraces an *inter vivos* transfer subject at death to a limited power to alter or amend, the gift tax should be considered as excluding an *inter vivos* transfer so long as a power to alter or amend remains outstanding. There is no support for such a conclusion. Plainly, Mr. Justice Cardozo advanced the similarity of the two statutes only as lending support to his basic theory that in applying the gift tax substance must control over form.

Moreover, directly following his first reference to the estate tax provisions, Mr. Justice Cardozo made a comment which definitely rejects the implications Judge Swan sought to attribute to his statement. Referring to the so-called estate tax credits on account of gift taxes paid in respect of previously transferred property, Justice Cardozo said (p. 286):

"What is paid upon the one is in certain circumstances a credit to be applied in reduction of what will be due upon the other."

These credit provisions constitute an affirmative declaration by Congress of an intention immediately to impose gift taxes on *inter vivos* transfers of prop-

erty, even though the property so transferred may be subject to the estate tax on the grantor's death. Take, for example, the case of a gift made in contemplation of death. The property must be included in the gross estate under the specific language of Section 302(c) of the Estate Tax Title. Yet clearly the property is subject to the gift tax at the time of the *inter vivos* transfer. Realizing that such situations would arise, Congress made provisions for a system of estate tax credits on account of gift taxes paid in respect of previously transferred property which nevertheless was made part of the gross estate for estate tax purposes.† Mr. Justice Cardozo's reference to and recognition of these gift tax credits indicate that he had in mind no such idea as Judge Swan attributed to his remarks.

There is nothing, we submit, in the opinion of this Court in the *Guggenheim* case which justifies Judge Swan's reasoning that because a transfer in trust subject at death to a limited power to alter is part of the gross estate for estate tax purposes, the tax on gifts *inter vivos* should be delayed so long as such a power remains outstanding. On the contrary, the very holding in the *Guggenheim* case negatives the possibility of any such contention. Adopting the premise that in the case of a transfer in trust only one gift tax attaches, the *Guggenheim* case squarely holds that the taxable transfer occurs on the surrender of the power of revocation, that is, when the property is "put beyond recall". If this is so, it necessarily follows that on the occurrence of that

† Section 322 of the 1924 Act (continued in subsequent Acts) expressly provided that where a gift tax is imposed upon "any gift" and thereafter "upon the death of the donor the amount thereof [i. e., of the gift] is required by any provision of Part I of this Title to be included in the gross estate", the amount of the gift tax shall be allowed as a credit against the estate tax.

event, the power to lay a gift tax is exhausted and the later surrender of a limited power to modify will not support a tax.

### ***The Porter Case.***

The *Porter* case was decided within two months after the *Guggenheim* case. The *Porter* case was an estate tax case involving the application of Section 302(d), added to the estate tax law in the Revenue Act of 1924. Porter created a trust in 1918, reserving the power "to alter or modify", but expressly excepting "any change in favor of himself or his estate". Porter died in 1926 after the enactment of Section 302(d). It was held that the corpus of the trust was includible within the gross estate on account of the existence at death of the reserved power.

"The power", said Mr. Justice Butler, who wrote for the Court, "did not amount to an estate or interest in the property." Having thus announced this premise, he proceeded to set forth with great care the structure of the estate tax provisions. Section 302, defining the gross estate, requires the inclusion of seven separate categories, namely, (a) any interest in property of the decedent at the time of his death; (b) any interest of the surviving spouse; (c) any interest of which the decedent has made a transfer in contemplation of or intended to take effect in possession or enjoyment at death; (d) any interest of which the decedent has at any time made a transfer "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke"; (e) any interest held as a joint tenant or as a tenant by the entirety; (f) any interest in property passing under

a general power of appointment by will or by deed; and (g) the amount of life insurance receivable.

The petitioners argued, said Mr. Justice Butler, that (a) was a limitation upon (d), and since Porter had divested himself of all interest in the property prior to his death, it did not fall within the gross estate. Rejecting this argument, the Learned Justice said (p. 442):

“Subdivision (a) does not in any way refer to or purport to modify (d) and \* \* \* it cannot be said that, if it stood alone, (a) would extend to the transfers brought into the gross estate by (d).”†

After stating that “Congress has progressively expanded the bases for such taxation”, Mr. Justice Butler then pointed out “that (d) is not a mere specification of something covered by (a), but that it covers something not included therein”, adding (p. 443)—

“The net estate upon the transfer of which the tax is imposed, is not limited to property that passes from decedent at death. Subdivision (d) requires to be included in the calculation all property previously transferred by decedent, the enjoyment of which remains at the time of his death, subject to any change by the exertion of a power by himself alone or in conjunction with another.”

The petitioners argued that since Porter was “without power to revoke the transfers or modify the trusts in favor of himself or his estate”, the property was not covered by subdivision (d). But Mr. Justice Butler pointed out that the three words descriptive of the powers were used disjunctively, and

† This Court had already held that an *inter vivos* transfer in trust subject to a power of revocation was includible in the gross estate within subdivision (c). See Footnote, p. 34, *supra*.



hence the reserved power to alter existing at death was within the language of the Section, adding (p. 443)—

“So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. The transfers under consideration are undoubtedly covered by subdivision (d).”

In view of the use which Judge Swan made of this comment in the course of the majority opinion in the *Hesslein* case, it should be noted that the significant feature is the qualifying phrase “So far as concerns the tax here involved”, namely, the estate tax. As so qualified, the statement is eminently sound, and as so qualified it is entirely inapplicable to the Gift Tax Act, which does not contain anything similar to subdivision (d).

The petitioners argued that to impose an estate tax would be to tax *inter vivos* gifts “that were fully consummated prior to the enactment of subdivision (d).” Not denying this, Mr. Justice Butler answered that such a contention failed to take into consideration the existence of “the power [to alter] the donor reserved unto himself alone”, adding that the decedent’s death “was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living”, and concluded by saying (p. 444):

“Thus was reached what it [Congress] reasonably might deem a substitute for testamentary disposition.”

That is to say, a limited power to alter is not an “interest in the property”, and accordingly it does not fall within subdivision (a). But subdivision (d)

goes beyond (a) and specifically requires the inclusion of previously transferred property still subject to such a power at death. The death of a grantor retaining such a power is the source of valuable assurance passing from the dead to the living, and Congress might require the inclusion of such property since what it reached might reasonably be deemed "a substitute for testamentary disposition."

Mr. Justice Butler's analysis of the estate tax provisions really controls, we submit, the question here presented. Section 319 of the Gift Tax Act imposes a tax on "the transfer \* \* \* by gift \* \* \* of any property." This in legal import is the counterpart of (a) in the Estate Tax Act. Both are confined to the transfer of a present interest in property. Neither section, either expressly or by implication, purports to lay a tax on the surrender of a limited power to alter. But (a) in the Estate Tax Act does not stand alone. There is subdivision (d), which specifically broadens the incidence of the estate tax to include property subject to such a power. The Gift Tax Act does not contain any counterpart of (d), although Congress had before it the structure of the estate tax provisions when it framed the gift tax. It would seem to follow as a matter of simple logic that in the absence in the Gift Tax Act of any provisions covering reserved powers and their surrender, the gift tax was laid and was intended to be laid on the present "transfer" of the property, and not delayed on account of the existence of a retained power to alter.

In summary, we submit that the *Guggenheim* and *Porter* cases establish the following principles: (1) under the Gift Tax Act only one tax in respect of a transfer in trust is levied; (2) where a power of revocation is terminated there is a "transfer" of the property and the gift tax attaches; (3) by the necessity of

exclusion, a gift tax does not attach where in a subsequent period a reserved power of modification is surrendered; (4) under the Estate Tax Act, subdivision (a) is not broad enough, standing alone, to include property covered by a limited power to alter; in order to include this in the gross estate subdivision (d) is necessary; (5) under the Gift Tax Act the only incidence of tax is the "transfer" of property, which is the counterpart of (a) in the Estate Tax Act; the Gift Tax Act has no counterpart of (d), and hence the incidence of the Gift Tax Act does not extend to the surrender of a limited power of alteration.

This Court only recently has considered the character of a grantor's interest in a trust subject to a reserved power of revocation, as it bears upon a state's jurisdiction to tax. *Curry v. McCanless, Commissioner*, No. 339, October Term, 1938, decided May 29, 1939; *Graves, et al., Commissioners v. Elliott*, No. 372, October Term, 1938, decided May 29, 1939. In the *Elliott* case, this Court said that "The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent" is a proper subject of state taxation at the domicile of the grantor. This is a clear recognition of the principle that the termination by death of a retained power of revocation constitutes a "transfer" of the property subject to the power. That being the case, it must be equally true that where such a power is terminated by a surrender *inter vivos*, there occurs the "transfer" of the property, for at that point the "equivalent of ownership" no longer exists. But in the case of a limited and non-beneficial power to alter, the power is not the "equivalent of ownership", and, as this Court said in the *Porter* case, it does not constitute an "interest" in the property. At most, the termination of the power on death is

only "a substitute for testamentary disposition" sufficient to support an estate tax. Accordingly, the surrender *inter vivos* of such a limited power to alter cannot amount to a "transfer \* \* \* by gift" of the property subject to the power, since the "transfer" has already occurred when the beneficial power to retake was previously surrendered.

While both are transfer taxes, the estate tax and the gift tax are, in fact, taxes of a very different character. The estate tax is the last tax which the Government may impose upon a citizen. The history of the estate tax makes it abundantly clear that Congress has continuously enlarged the scope of the Act to include an ever-increasing field, of which perhaps Section 302(d) is the most extreme instance. Being the final exaction, this Court has gone far in upholding the estate tax in its broad scope. *Helvering v. City Bank Co.*, 296 U. S. 85 (1935); *Porter v. Commissioner*, *supra*.

But the gift tax, unlike the estate tax, is not a final catch-all. It is a simple tax upon the *inter vivos* "transfer \* \* \* by gift \* \* \* of any property". It is an intermediate tax and not a final tax in the sense that it is imposed immediately upon any *inter vivos* transfer, whenever occurring, as distinguished from the final tax imposed at death. While enacted in part to prevent estate tax avoidance, the gift tax is a wholly separate tax and should be so interpreted.

In spite of Mr. Justice Butler's clear analysis of the structure of the estate tax in the *Porter* case, the absence of any counterpart of subdivision (d) in the Gift Tax Act, the difference in character between a power of revocation and a non-beneficial power to alter, and the lack of similarity between the estate tax and the gift tax, Judge Swan in the *Hesslein* case brushed aside all these considerations, treated the

two kinds of powers as of equal dignity and said that since the primary purpose of the gift tax is to supplement the estate tax "it is reasonable to construe the former as excluding gifts so incomplete by reason of powers reserved to the donor, as to be expressly made subject by the latter to the estate tax".

This, we submit, is a fundamental misconstruction not only of the two statutes but of the decisions of this Court in the *Guggenheim* case and the *Porter* case. It is tantamount to saying that Congress intended to postpone any gift tax upon an *inter vivos* transfer in trust so long as the property which is the subject matter of the trust is includible within the gross estate should death intervene. The language which Congress used in imposing the gift tax does not justify any such conclusion; an analysis of the Estate Tax Act, when compared with the language imposing the gift tax, does not justify such a conclusion; the existence of the estate tax credit provisions in respect of previously paid gift taxes belies such a conclusion; and, we respectfully submit, it is definitely contrary to the reasoning of this Court in the *Guggenheim* and *Porter* cases.



## IV.

The reasoning advanced in the majority opinion in the *Hesslein* case, adopted by the Court below, is fallacious.

A reading of Judge Swan's opinion in the *Hesslein* case leaves one somewhat bewildered. At the outset of his opinion, he declares that "where the settlor reserves the power to revest title in himself" no gift tax is imposed, and adds that "in such a case the gift of the corpus occurs when the power of revocation is terminated", citing Section 501(c) of the Revenue Act of 1932 and the decision of this Court in the *Guggenheim* case. Then he says that the power involved in the *Hesslein* case was not as absolute as that considered in the *Guggenheim* case, but asserts that it "is nevertheless broad enough" to enable the donor "to make a complete revision of all he has done", save only that "the alteration must not revest any interest in himself or his estate". Quoting from Mr. Justice Butler's opinion in the *Porter* case, he argues that for estate tax purposes there is no difference in treatment between a power to revoke and a limited power to alter, and concludes that "this is equally true so far as concerns the gift tax".

In so reasoning, Judge Swan utterly failed to differentiate between the character of a power to revoke and the character of a non-beneficial power to alter; and in so far as his reasoning is bottomed on the treatment of powers for estate tax purposes, it is fundamentally fallacious.

Next Judge Swan argues that when there exists a power to change beneficiaries "nothing has been done to give assurance that any part of the principal will ever be received by the named donees", and as

"the donee of any gift" is secondarily liable for the tax, it "seems unlikely that Congress would intend to impose personal liability upon a donee who might thereafter be deprived of all interest in the property at the will of the so-called donor", using, for example, the appointment of the corpus to a charity, and adding that a gift "demands a donee as well as a donor", and is "incomplete" until "the beneficiaries are determined".

Here Judge Swan confuses the trust estate as such and those who are beneficially interested in the enjoyment of the property. In a trust of this character, the individual beneficiaries are not "the donee" in the sense that they are the persons presently made liable for the tax; it is the trustee as the representative of all interests, present and future, and all persons, determined and undetermined, which is the donee in this sense. Under the 1924 Act, a ten year statutory lien attached to the donated property, and in the case of a trust the "trustee" as custodian of the property subject to the lien was liable for the tax in the event the donor failed to pay. See Revenue Act of 1924, Section 315 (a) and (b).† In the 1932 Act, the secondary liability was imposed broadly on "the donee", with a ten year lien on the property. This change in the statute did not, we submit, shift the liability from the trust estate and impose a personal liability on the beneficiaries as such, for surely it was not the intention of Congress to make one of a number of beneficiaries individually liable for the entire tax, regardless of the extent of his interest in the trust estate.

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† The word "beneficiary" in Section 315(b) obviously refers and refers only to the word as used in (b)(2), namely, a beneficiary under an insurance contract, and does not include the beneficiary of a trust.

But the argument is quite erroneous on account of a fundamental fallacy. Judge Swan overlooks the point that in the case of a trust the need of a fixed donee capable of taking is quite separate from the possible shifting of the beneficial enjoyment, whether such shifting may be pursuant to a power in the settlor or pursuant to contingencies provided for in the trust deed. As he himself points out, there cannot be a valid gift, whether direct or in trust, without an identifiable and fixed donee. But trusts of the character of those here involved are valid trusts and do not fail for the lack of a donee, namely, the trustee or the trust estate as a whole; they are not incomplete because subject to a reserved power to change beneficiaries or to appoint to a charity.

In the case of a *revocable* trust, such as this Court considered in the *Guggenheim* case, obviously there is no permanent donee so long as the power of revocation remains outstanding. But where a trust has become *irrevocable* by the settlor's surrender of all power to revest in himself income or corpus, the trust thereupon is final and permanent and a final and permanent donee exists. By the surrender of such a power the grantor is deprived for all time of the property, and the complete and full beneficial enjoyment of such property is assured for all time in others than the grantor. In such a case, there is no burden in requiring the payment of the tax upon the surrender of the power to revest. It matters not whether a charity is ultimately substituted as the beneficiary, for this occurs by the donor's own act and neither he nor the trust estate can complain. In the case of a charity, the exaction of a tax at the point when the power to revest is surrendered consti-

tutes no greater burden than where there is an absolute transfer in trust, with a charity named as a contingent beneficiary, and the contingency later occurs. In such a case no one would complain that the exaction of the tax on the creation of the trust was improper or unsound.

Next Judge Swan argues that in any event there is "at least uncertainty" whether a trust which leaves the beneficiaries so indeterminate is the kind of gift which the statute was meant to tax. But if the imposition of the gift tax must await the resolution of contingencies, the tax would often be postponed indefinitely, even where there are no reserved powers. There is hardly a trust which does not contain provisions for the contingent shifting of the beneficial interests, and trusts are of everyday occurrence where, with or without the accumulation of income during minority, on the death of a named life tenant there are contingent gifts over of income and principal, which may not be determinable for many years, and often with a contingent gift over to charity. Surely Congress could not have intended to withhold the imposition of the gift tax in the case of such trusts until all the contingencies were resolved and the beneficial interests finally fixed. Yet this would follow from Judge Swan's reasoning. Judge Hand in his dissenting opinion laid emphasis upon this point, saying (p. 957):

"It seems to me to make no difference that the settlor in the present case can shift these interests according to his future will instead of leaving them to be determined by contingencies provided for in the deed of trust."

Next, Judge Swan argues that the gift tax and the estate tax "must be construed in conjunction", citing

Mr. Justice Cardozo's comment in the *Guggenheim* case that the two statutes are in *pari materia*, and adding that "it is reasonable" to construe the gift tax as excluding transfers expressly made subject to the estate tax. As we have seen (p. 46, *supra*), Mr. Justice Cardozo in making this comment had no such idea in mind. He likened the two statutes on the score only that in their application form should not be exalted over substance.

Finally, Judge Swan's treatment of the Treasury Regulations is difficult to explain. The Regulation before him was Article 3 of Regulations 79 (1933 Edition). He conceded that this Article "has construed the statute as imposing a gift tax on such a transaction as the one involved in the case at bar." Then he added, "These regulations, however, are of recent adoption and have not the sanction which would result from a subsequent reenactment of the statute." As we have pointed out on pages 23-4, *supra*, Judge Swan must have been wholly unaware that the rule which he so casually brushed aside had been embodied in the formal Regulations of the Commissioner ever since the enactment of the Gift Tax Act of 1924, and that the 1932 Regulations were an adoption and continuation of the same rule. Had he realized this permanency and uniformity of rule, his comment would have been wholly unwarranted.

By way of comparison with Judge Swan's reasoning, we respectfully commend the cogent and persuasive reasoning of Judge Augustus N. Hand in his dissenting opinion. "In the case at bar", said Judge Hand, "the settlor parted with all beneficial interest in the corpus when he created the trust and under his reserved power could only make appointments by will in certain conditions or modify the trusts in favor of new beneficiaries without revesting anything



in himself." Citing the *Guggenheim* case, he added that the settlor "made no gift until he renounced his right to retake possession of the res."

After commenting on the fact that there seems to be no distinction between a case where the beneficial interests are shifted according to the will of the settlor or according to the contingencies provided for in the trust deed, Judge Hand advanced a most convincing argument. He said that Section 501(b) taxes generally all transfers in trust; that subdivision (c) excludes from taxation "property transferred in trust where the settlor had reserved a power to re-vest title in himself and had not relinquished the power." Accordingly, says Judge Hand, the sweeping language of (b) requires the imposition of a gift tax except in the narrow case excluded, and so the transfer subject to the gift tax occurred on the creation of the trust.

Judge Hand was considering the 1932 Act and not the 1924 Act: Nevertheless, the same considerations apply here, for as this Court said in the *Guggenheim* case, "We think the regulation [the 1924 regulation], and the later statute continuing it, are declaratory of the law which Congress meant to establish in 1924."

### **Conclusion.**

As the record discloses, the Treasury considered this case with the utmost care. The various considerations for and against the rule for which we contend were attentively received and earnestly considered, and in the end the Treasury upheld the rule of its Regulations, and for good reason—it was sound in principle, it was simple and easily applied, it carried out one of the main purposes of Congress in en-

acting the Gift Tax Act, and it preserved the Government revenues and prevented widespread tax avoidance.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Third Circuit should be reversed, and the case remanded, with a direction to enter a judgment of no deficiency.

Respectfully submitted,

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WILLIAM A. CARR,  
*Attorneys for the Petitioner.*

Dated, September 15, 1939.



## APPENDIX.

### The Gift Tax Statutes.

#### Section 319 of the Revenue Act of 1924:

"For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: \* \* \*"

#### Section 501 of the Revenue Act of 1932:

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to re-vest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination

of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift."

[Subdivision (c) of Section 501 was later repealed by Section 511 of the Revenue Act of 1934. See Brief, p. 23, *supra*.]

### **The Gift Tax Regulations.**

#### **Article 1, Regulations 67 (1924 edition):**

"The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated."

#### **Article 3, Regulations 79 (1933 edition):**

"Transfers in trust.—Where property is transferred in trust without an adequate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, but, where the donor reserves such power, the transfer does not constitute a gift within the meaning of the statute. The relinquishment or termination, without an adequate and full consideration in money or money's worth, of the power to revest in the donor title to property



transferred in trust, is a gift of such property at the time of the relinquishment or termination of the power, except where the power is terminated by the donor's death."

### **Income and Estate Tax Provisions Covering Reserved Powers.**

#### **Section 219 (g) of the Income Tax Act of 1924:**

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

#### **Section 302 of the Estate Tax Act of 1924:**

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property \* \* \*

(a) To the extent of the interest therein of the decedent at the time of his death \* \* \*

\* \* \*

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth; \* \* \*"



FILED  
OCT 16 1939

CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**  
October Term, 1939.  
No. 34.

ESTATE OF CHARLES HENRY SANFORD, Deceased,  
Jennie R. Baird, Substitutionary Administratrix,  
c. t. a.,

*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.

**REPLY BRIEF FOR THE PETITIONER.**

✓ JOHN W. DAVIS,  
✓ MONTGOMERY B. ANGELL,  
✓ OTIS T. BRADLEY,  
✓ WILLIAM A. CARR,  
✓ MARVIN LYONS,  
*Attorneys for the Petitioner.*



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IN THE  
**Supreme Court of the United States**  
October Term, 1939.

ESTATE OF CHARLES HENRY SANFORD,  
Deceased, Jennie R. Baird, Substi-  
tutionary Administratrix, c. t. a.,  
*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

No. 34.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

**REPLY BRIEF FOR THE PETITIONER.**

The Solicitor General has filed a single document, comprising at one and the same time the Government's reply brief in the *Sanford* case, No. 34, and its main brief in the companion case, the *Humphreys* case, No. 37.

"The two cases at bar", says the Solicitor General (p. 10), "present a single question of statutory interpretation", a statement in which we entirely concur. As the respondent in No. 34 and the petitioner in No. 37, he admits (p. 11) that the Government has "necessarily been forced" to take "inconsistent positions" in the two cases. He then adds: "A decision favorable to the Government in either case will necessarily preclude a favorable decision in the other." Again we agree.

Believing that "a genuine doubt" exists "as to the proper interpretation of the statute" (p. 11), the

Solicitor General announces that "we do not feel justified in urging upon the Court adoption of either view to the exclusion of the other". Accordingly, in Part I of his brief the Solicitor General sets forth "The argument in support of the Government's position in the *Humphreys* case" (our position in the *Sanford* case), and in Part II "The arguments in support of the Government's position in the *Sanford Estate* case" (in opposition to us).

We are not unappreciative of this attitude of what we may call "benevolent neutrality", and we sympathize with the unhappy position in which the Solicitor General finds himself. Nevertheless, it seems unfortunate that the Department of Justice is unable to reach a definite conclusion on a point of law of such vital importance in the proper administration of the Federal revenues. At no point are we advised, nor is this Court informed, whether the Solicitor General is for us or against us, wherein lie the interests of the Treasury Department charged with enforcing the statute under consideration, or which of the two conflicting constructions of the statute he considers sound.

Throughout the brief there is a use of phrase and a treatment of the decisions of this Court unusual in a brief in opposition, but possibly inevitable on account of the dual position taken. Both in Part I and Part II there constantly appear such phrases as "there are persuasive reasons for believing" (pp. 22, 29), and "this would seem to indicate" (p. 22), and "the assumption seems warranted" (p. 27), and "it may plausibly be argued" (p. 40). The Solicitor General's treatment of the decision of this Court in *Burnet v. Guggenheim*, 288 U. S. 280, a case of major importance as it bears upon the issue presented, is in similar vein. "The opinion of this Court", says the Solicitor General (p. 18), "can be

used as the basis of an argument on either side of the issue involved in the present cases". For our part we believe that the *Guggenheim* case is square authority in support of our position, both in its reasoning and in its ultimate holding. The Solicitor General does not say whether he agrees or disagrees.

With a Government brief so cast, there is real difficulty in focusing the issue between "the opposing parties" to this lawsuit. We counter upon one assertion made, only to find that at another point the Solicitor General undertakes to cast doubt upon the same contention, yet does not repudiate it. Our real opponent appears to be the respondent in the *Humphreys* case, No. 37. Confronted with this situation, in this reply we shall discuss the statements made in the Government's brief with which we do not agree and endeavor to clarify where clarification seems necessary, and then discuss briefly the contentions of the respondent in the *Humphreys* case.

## I.

**Comments on the Solicitor General's arguments in support of the Government's position in the *Humphreys* case (our position in the *Sanford* case).**

There is much with which we agree, although there are certain points of difference.

After stating (pp. 12, 22) that the language of the 1924 Act itself implies an intention to impose the tax upon the "transfer", as distinguished from the receipt, the Solicitor General says (p. 22): "Unquestionably there was, in both cases at bar, a completed transfer of property when the power of revocation was relinquished."† This, of necessity, must be true,

† Compare this statement with the statement at the bottom of page 40, namely:

"\* \* \* it may plausibly be argued \* \* \* that there is not a completed gift from the donor."

since the trusts in both cases were valid gifts in trust and did not fail for the lack of a donee capable of taking, namely, the trust estate as a whole.

The Solicitor General then advances an argument of telling weight. The donor, he says (pp. 12, 22), is the one primarily made liable for the tax. This indicates a legislative intention to impose the tax on the transfer rather than on the final vesting of rights in the beneficiaries. If the tax is upon the donor at the date of transfer from the donor, such a valuation date "most truly measures his donative intent". If, on the other hand, the imposition of the tax is postponed until the ultimate beneficiaries are finally fixed, which may not occur for many years, future fluctuations in the value of the property may occur which will materially affect the amount of the tax imposed, thus confronting a would-be donor with complete uncertainty as to the amount of his liability, and in many instances reducing materially the amount of the tax. To impose the tax at the point where the grantor irrevocably parts with the property means the use of a valuation date permitting a ready determination of the tax, and the amount of the tax so computed will accurately reflect the amount of the gift. As the Solicitor General says (p. 12), such a determination of the tax is "most consistent with the philosophy of the tax".

#### *The Treasury Regulations.*

We do not subscribe to the Solicitor General's interpretation of the Treasury Regulations. He says (p. 12) that "they do not specifically cover the present situation", although they "contain the implication that the tax is to be imposed" when the grantor surrenders the right to retake. On the contrary, we submit that the Treasury Regulations unequivocally and



without shadow of doubt apply, and were intended to apply, to the very class of trusts with which we are here dealing.

The language of the Regulations is clear and unambiguous. "A taxable transfer", read the Regulations, "will be treated as taking place" in the year in which "the power retained by the grantor to revest in himself title to the corpus" is terminated. Sanford, in 1919, irrevocably surrendered the power "to revest in himself title to the corpus" of the trust created in 1913. Similarly on the creation of the Humphreys trust in 1934 Humphreys irrevocably surrendered the power "to revest in himself title to the corpus" of the trust. If the tax attaches on a prescribed event, namely, the surrender by the grantor of the power "to revest in himself title to the corpus", under the clear-cut language of the Regulations it must necessarily attach on the occurrence of that event, whether or not there is the retention or non-retention of any other power.†

With the exception of the Court below, every authoritative voice which has undertaken to construe these Regulations has so interpreted them. As we pointed out on page 20 of our main brief, the Chief Counsel for the Bureau of Internal Revenue in the second *Sanford* ruling (G.C.M. 14774) quoted Article 1 of Regulations 67 (1924 Edition) and laid his

† The Solicitor General himself inferentially has recognized the inevitableness of such a construction. On pages 57-58 he sets forth in *extenso* Article 3 of Regulations 79 (1936 Edition), and at the top of page 58, at the end of the sentence in the Article stating that "The relinquishment" of the power to revest "is regarded as the event which completes the gift and causes the tax to apply", he drops down a footnote reading:

"So held in *Burnet v. Guggenheim* (288 U. S. 280, 53 S. Ct. 369) of a transfer in trust, made in 1917, with power in the donor to revoke, which power he relinquished in 1925, the relinquishment being treated a gift subject to the tax imposed by the gift tax title of the Revenue Act of

opinion squarely upon the Regulations. Again, in G.C.M. 19260, the Chief Counsel specifically said (R. 29): "G.C.M. 14774 gives full effect to the regulations".

The Commissioner of Internal Revenue has so construed the Regulations. It is a matter of record that the Commissioner has closed or adjusted approximately 300 cases "of the character of that here involved" in accordance with the Regulations (R. 13); and during the course of the *Humphreys* case when the Respondent's motion for summary judgment was filed, the Government counsel stated to the Court "that the Commissioner had not acquiesced in" the *Hesslein* case (Res. Brief, p. 9).

In the *Hesslein* case, Judge Swan had before him Article 3 of Regulations 79 (1933 Edition) (see Res. Br., p. 27), which, as the Solicitor General concedes (p. 25), is identical with Article 1 of Regulations 67 (1924 Edition), and Judge Swan unqualifiedly stated that this Regulation "has construed the statute as imposing a gift tax on such a transaction as the one involved in the case at bar."

Finally, the Solicitor General by his own statement refutes his assertion (p. 12) that the 1924 Regulations do not "specifically cover the present situation". On pages 25-26 of his brief, he quotes *in extenso* from the 1936 Edition of Regulations 79 issued under the 1932 Act. "The tax is not imposed upon the receipt of the property by the donee", read these Regulations. "nor is it conditioned upon the ability to identify the donee at the time of the transfer". On the contrary, "the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then

be known or ascertainable". And again, "The relinquishment or termination of the power [i.e. to re-vest in himself] occurring otherwise than by the death of the donor \* \* \* is regarded as the event which completes the gift and causes the tax to apply".

This Regulation, the Solicitor General concedes, unquestionably covers the situation here involved, for he says (p. 26) that Regulations 79 (1936 Edition) "seem clearly to contemplate that the creation of an irrevocable trust or the relinquishment of a power of revocation constitutes a taxable gift *irrespective of the reservation of a power of modification*". (Italics supplied.)

But if this is so, it necessarily follows that the earlier Regulations prescribe, and were intended to prescribe, the same rule. Regulations 79 (1936 Edition) unquestionably are simply a reiteration of the rule announced in the earlier Regulations and an amplification of its statement. The second and favorable *Sanford* ruling (G.C.M. 14774) was promulgated on April 8, 1935 (see our main brief, pp. 7-8; R. 12). Regulations 79 (1936 Edition) were promulgated on February 26, 1936. Thus the 1924 Regulation, the 1932 Regulation and the *Sanford* ruling ran side by side with the 1936 Regulation for almost two years. The stipulated uniformity in practice of the Commissioner in adjusting cases of this character since the enactment of the 1924 Act until the decision in the *Hesslein* case in 1937 affirmatively testifies to the identity of the rule under all the Regulations.

#### ***The Guggenheim Case.***

The Solicitor General's treatment of the *Guggenheim* case, as we have pointed out above, is not satisfactory. On page 24, he says: "If the *Guggenheim* decision means that any relinquishment of a power of revocation is a taxable gift, the *Sanford* gift was

completed in 1919 and consequently his subsequent renunciation of the power of modification is not subject to tax". He then goes on to say that while this interpretation finds "considerable support" in the language of the opinion, "it seems doubtful" whether the decision may properly be interpreted as authority for such a broad proposition. Yet at another point (p. 23), after quoting from the opinion that "a gift is not consummate until put beyond recall", he says: "This language may well be deemed to contain the negative indication that transfers, such as the ones here involved, which are beyond recall \* \* \* do constitute taxable gifts within the meaning of the statute."

As we pointed out in our main brief (p. 41 *et seq.*), the reserved power in the *Guggenheim* case included the power to revoke, and it was the effect on the grantor's interest in the property occasioned by the surrender of the power to revoke which was the *ratio decidendi* of the decision. Clearly Congress was under the impression that this was the effect of the decision when it repealed Section 501(c) of the 1932 Act. That Section specifically provided that the relinquishment of "the power to revest in the donor title to" the property in trust "shall be considered to be a transfer by the donor by gift", language which squarely covers the situation here involved. The two Committee Reports accompanying the repeal placed the repeal on the ground that "the principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court's decision in the *Guggenheim* case". We think Congress properly construed the decision of this Court in that case. In any event, this action by Congress is conclusive evidence of the legislative intent.

### *The Secondary Liability of the Donee.*

In discussing the effect of the secondary liability of "the donee" (pp. 31-32), the argument of the Solicitor General is not wholly satisfactory, though in general we concur. After quoting Section 510 of the 1932 Act imposing a ten-year lien on the property and providing that if the tax is not paid when due "the donee" shall be personally liable for such tax, the Solicitor General says: "We think it probable that Congress intended that in such event the trust estate should be made to respond for the tax in the first instance by enforcement of the statutory tax lien." He then adds that if this is true, the liability of the donee (which he assumes is the beneficiary) is imposed upon him "only when the gift to him is completed" (meaning, we presume, the surrender of the power to change). Under this argument, the secondary liability would fall in the first instance on the trust estate to the extent of the ten-year lien on the property, and only secondarily on the beneficiaries, and then to the extent only of the value to each of the interest of each when such interest becomes fixed.

This, we believe, is a feasible interpretation of the 1932 Act from a practical standpoint, except that we should say the liability of each beneficiary would be his *pro rata* share of the liability of the donor, for the secondary liability unquestionably is derivative, and, as the Solicitor General says on page 23, the theory of the statute contemplates as the valuation date the time of transfer from the donor. Certainly, as the Solicitor General says (p. 32), it is not reasonable that a single beneficiary should be liable for the entire tax, when his interest may be only a minor one.

But we are not fully convinced that this is the proper interpretation of either the 1924 or the 1932 Act. As we pointed out on page 56 of our main brief,



the 1924 Gift Tax Act did not undertake to make the donee secondarily liable, but by reference to the estate tax provisions a ten-year lien attached to the donated property, and in the case of a trust "the trustee" as custodian of the property subject to the lien was liable for the tax in the event the donor failed to pay. In the 1932 Act, the secondary liability was imposed broadly on "the donee", coupled with a ten-year lien on the property. Under the 1932 Act, it is quite consistent with the canons of interpretation to treat the trust estate as "the donee" for this purpose. If so, then on the failure of the grantor to pay, the tax would be payable out of the trust property, thus depleting it to the extent of the tax and so indirectly spreading the burden of the tax over the several beneficiaries *pro rata* in accordance with the interest of each. If the corpus of the trust is so depleted on account of the collection of the gift tax, the beneficiaries, whether those originally designated or later substituted, cannot complain, for they gave no consideration but are merely the recipients of the donor's bounty. This accomplishes the same end as the suggestion of the Solicitor General (p. 32) that if the beneficiaries who are dropped out should be compelled to pay, they would have "a right of reimbursement from the trust estate or from the ultimate beneficial takers". But, in any event, as the Solicitor General himself says (pp. 32-33), it is somewhat strained to undertake to fix the point at which the gift tax attaches on account of possible hardships which might arise under one of several possible constructions of another ambiguous section of the law.

### ***The Porter Case.***

The Solicitor General (p. 33) takes issue with our interpretation of the *Porter* case, arguing that Section 319 of the Gift Tax Act is unlike Section 302(a) of the Estate Tax Act. Section 302(a) requires the inclusion in the gross estate of any "interest" existing at death, while Section 319 taxes a present "transfer" by gift. Under Section 302(a) the word "interest" connotes, we submit, the existence at death of a beneficial interest; and under Section 319 the word "transfer" connotes, we submit, a shift in beneficial interest from the grantor to others. Fundamentally, therefore, the incidence of the tax under both sections is the same. The Solicitor General points out that in the *Reinecke* case this Court held that the existence on death of a power of revocation brought the property into the gross estate under Section 302(c). But under this Court's decision in the *Guggenheim* case and particularly its more recent decisions in the *McCunless* case and the *Graves* case, wherein the power of revocation was said to constitute the "equivalent of ownership", the inclusion in the gross estate of property subject on death to a power of revocation might equally have been supported under Section 302(a).

### ***Tax Postponement and Tax Avoidance.***

The Solicitor General says that "we do not believe" a decision either way in these cases will have "any predictably adverse effect upon federal revenues" (pp. 11, 37, 50), adding (p. 36) that "we cannot agree that a decision that the tax attaches only upon relinquishment of the power of modification would permit 'flagrant and widespread income tax avoidance'". At no point does he deny our assertion that under the rule of the *Hesslein* case

the collection of gift taxes would be indefinitely postponed if not entirely frustrated.

The Solicitor General's statement is indeed astonishing in view of the record in this case. Whatever view the Department of Justice may have on the matter, the attitude of the Treasury Department is not in doubt. Rarely has a question been given more careful and thorough consideration by the Internal Revenue authorities than the one raised in the *Sanford* case. First a hearing was had in 1934 before the Miscellaneous Tax Unit, at which the question was fully argued and considered (R. 12). After reference of the question to the Assistant General Counsel for the Bureau, a second and even more extended conference was had, at which Arthur H. Kent, acting for the Assistant General Counsel in his absence, and some ten or twelve representatives of the Treasury, were present (R. 12). In the second and favorable ruling, the Assistant General Counsel said (R. 21) that "upon a careful consideration" the Bureau must "adhere" to the position that the gift tax attaches on the relinquishment of the right to revest, adding that if the vesting of title in the donee were to be adopted as the criterion "any such rule would not only be in conflict with the court decisions and regulations cited but, it seems certain, would also lead to many difficulties of an administrative character and otherwise". What these are it is not difficult to discern. We have the explicit testimony of Mr. Kent, a responsible Treasury official, who, in delivering the *Sanford* ruling for transmission to the Under Secretary of the Treasury, said (R. 26):

"I am now convinced that the position tentatively taken in the prior opinion should not be maintained, and that its possible prejudicial re-

sults upon the revenues both from gift tax and income tax far outweigh the considerable revenue we would gain from asserting a gift tax liability against this trust. Even though we won in the courts, which seems unlikely under the present statutes and regulations, our victory would be a Pyrrhic one."

There was no doubt in Mr. Kent's mind that the rule of the *Hesslein* case would be definitely prejudicial to the Federal revenues, both from the standpoint of the gift tax and of the income tax. The proposed tax which Mr. Kent had under consideration would, with interest, amount to well over a million and a half dollars. The fact that the "possible prejudicial results upon the revenues" would "far outweigh" this "considerable revenue" serves to indicate the extent of the Treasury's apprehension of the adverse effect on Federal revenues, if the other rule were adopted. The Government in its petition for certiorari in the *Hesslein* case (No. 556, October Term, 1937) estimated that approximately \$5,000,000 must be refunded in back gift taxes under that decision. This does not take into account the loss of future gift tax revenue or the future savings in income taxes under such a rule. Nor is it without significance that despite the decisions in the *Hesslein* case, the *Humphreys* case and this case below, the Treasury has not modified its formal Regulations.

Congress itself in 1924 realized the need of the rule in order to prevent income tax avoidance. From the Congressional debates at the time of the first Gift Tax Act (see our brief, pp. 35 *et seq.*), it is abundantly clear that the two major purposes sought to be accomplished were the prevention of estate tax avoidance by the making of *inter vivos* gifts, thus reducing the high estate tax brackets, and

the prevention of income tax avoidance by splitting up large estates, thus reducing the surtax rates and so the income taxes.† These debates show that as early as 1924 the wealthy taxpayers of the country already had resorted to the device of splitting up large property holdings for the purpose of reducing and so saving income taxes. If in the case of a gift in trust the gift tax is payable at the point where the burden of the income tax shifts from the wealthy donor to the trust estate, either the would-be donor must refrain from making gifts and continue to pay the high income surtaxes on all his property, or if he makes a gift, thus saving income taxes, he must pay a gift tax. On the other hand, if the gift tax is withheld at the point where the burden of paying income taxes shifts from the donor to the donee and is imposed later on when the limited power of modification is surrendered (if ever), the door is wide open to income tax avoidance, for the gift tax will not operate as any deterrent in the splitting up of the property. Under such a rule, a tax saving loophole undeniably will exist, and will as certainly be availed of.

We may say here, as Mr. Justice Cardozo so pertinently said in *Burnet v. Wells*, 289 U. S. 670, 675:

"By the creation of trusts, incomes had been so divided and subdivided as to withdraw from the Government the benefit of the graduated taxes and surtaxes applicable to income when concentrated in a single ownership. Like methods of evasion, or, to speak more accurately, of avoidance (*Bullen v. Wisconsin*, 240 U. S. 625, 630), had been used to diminish the transfer or succession taxes payable at death. One can read in the revisions of the revenue acts the record of the Gov-

† This the Solicitor General concedes on p. 45 of his brief.



ernment's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens."

The Solicitor General commenting upon our argument in this respect says (p. 37): "The argument is premised on the assumption that, if threatened by the immediate imposition of a gift tax, the would-be donor would decide not to make the transfer at all \* \* \*," adding (p. 38) that "there are reasons why it cannot be assumed that this would be the reaction of the donor". No one, of course, can predict what a particular would-be donor might do. But the fact remains that if the rule of the *Hesslein* case is adopted, there would exist a broad and obvious loophole in the Federal statutes, and it is certainly not unreasonable to assume that the wealthy taxpayers immediately will take advantage of it, certainly in view of the high and very painful surtaxes.

The Solicitor General (p. 37) asserts that if Congress "had intended to guard against such avoidance, it would have done so directly by taxing the income from such a trust to the grantor, rather than indirectly by imposing a gift tax upon the creation of the trust". There is no support for this statement. In the first place, as we point out in the footnote on page 32 of our main brief, it probably would be beyond the power of Congress to close the income tax loophole by undertaking to lay the tax on the grantor after the grantor has lost all right to retake for himself the corpus or income, for as the Government in its brief in the court below expressly said, "A tax cannot constitutionally be imposed on one person with respect to income which belongs wholly to another." (See p. 32 of our main

brief.) Congress is as fully aware of such a limitation on its power as are the courts. In view of the constitutional difficulty, Congress would hardly seek to close the loophole in this fashion when it might so readily do so by the means of enacting a gift tax effective at the point where the burden of paying the income tax shifts from the grantor to others. If any conclusion is to be drawn from this condition of affairs, surely it is that Congress was fully aware of the matter and acted to close the loophole by exerting its unquestioned power to impose an excise tax on gifts, effective at the necessary point.

It is not our "solicitude" for the Government revenues which leads us to emphasize the tax postponement and tax avoidance implicit in the rule of the *Hesslein* case, as the Solicitor General seems to imply (p. 36). As we endeavored to make clear in our main brief (pp. 27 *et seq.*) we are here seeking to get at the intention of Congress. Where one of two alternatives in the interpretation of a revenue statute will result in tax postponement and tax avoidance while the other will prevent such a state of affairs and at the same time insure complete harmony between different parts of the same Act, it would be quite unreasonable to impute to the lawmakers an intention to adopt the former course. Surely Congress is not unmindful of conserving the Federal revenues, even though we may be less solicitous.

## II.

**Comments on the Solicitor General's arguments in support of the Government's position in the Sanford case (in opposition to us).**

Generally speaking, in this part of his brief the Solicitor General follows the line of thought indulged in by Judge Swan in writing for himself and Judge Stanton in the *Hesslein* case. The argument is rested largely upon the assertion that a gift in trust is "incomplete" so long as the identity of the ultimate beneficiaries remains uncertain† (see Res. Br., pp. 38-39).

***The Argument of Incompleteness.***

The Solicitor General says (p. 39) that for the purpose of "completeness" of the gift, it is necessary to say that the trustee is the donee, adding: "If that were true, the tax could be imposed upon a transfer in trust for the benefit of the donor." Quite obviously this does not follow, for in such a case there is no real "transfer" from the donor to anyone. The "transfer" subject to tax unquestionably contemplates the transfer of the beneficial ownership, and in the case suggested, the beneficial ownership remains in the donor, as well after as before the creation of the trust.

The Solicitor General (p. 39) rejects our argument of "completeness" predicated by analogy upon an absolute trust with contingencies set up in the trust instrument itself. Says the Solicitor General (p. 40):

"In such a case the grantor has fully exercised his power to choose beneficiaries \* \* \*, even though the ultimate beneficiaries might not

† Compare this statement with the Solicitor General's statement quoted on page 4, *supra*.

be known until certain events have occurred  
 \* \* \*. The gift to those ultimate beneficiaries is as complete as the donor can presently make it."

This, of course, is true. But the Solicitor General does not undertake to say whether in such a case the gift tax is imposed upon the creation of the trust, or whether it is withheld until the final contingencies definitely fix the ultimate beneficiaries. His silence is significant. In such a case, who is "the donee", and against whom is the tax? Are we led to believe that in such a case the gift occurs on the creation of the trust, as we confidently maintain, or at a later date, perhaps even after several years, when the contingencies occur? The Solicitor General does not say. If the latter, the value of the property which constitutes the subject matter of the gift may have fluctuated widely between the date of transfer and the date of ultimate enjoyment. Is it conceivable that a donor should be left in such complete doubt as to the amount of the tax due, when the imposition of the tax on the creation of the trust insures an exact measure of his liability? Precisely the same considerations apply to such a trust as in the case of the trusts here involved.

The case of a charity presents no problem, for if non-charitable beneficiaries are first named and later a charity is substituted, this happens by the grantor's own voluntary act, and the charity cannot complain because a gift tax has been collected on the creation of the trust, or as in a case such as ours, on the surrender of the power to revest.

The Solicitor General goes farther even than Judge Swan in the matter of "incompleteness" of the gift. He says (p. 40) that while the donor has made "a complete transfer of all his property rights in the trust estate", nevertheless he retains sufficient disposi-

tion of the property "as to afford him considerable indirect economic benefit from the property", a right which is (p. 41) "closely akin to a property right". The Solicitor General argues (p. 40) that the named beneficiaries or prospective donees "would be influenced" to act in accordance with the donor's wishes, implying that in this indirect fashion the donor in some way could enjoy for himself the benefit of the property. This is much the same argument which the Government advanced in the *Knapp* case in support of its effort to collect an income tax from the grantor after he had surrendered the power to revest corpus and income in himself. In the Circuit Court the Government argued that Knapp might cancel the rights of all the beneficiaries, might appoint the trust to his estate and thereby become the sole beneficiary, with the power to terminate and revest the corpus in himself. "The difficulty with this contention", said Judge Hand, "is that the language [of the trust] gave him no such power". The Government also contended that with the unlimited right reserved to appoint new beneficiaries, the settlor might select dummies of his own who would complacently cooperate in revoking the trust, and then the settlor might revest the corpus in himself. But Judge Hand again rejected such a contention, saying that the settlor did not have any such power in view of the limiting clause in the trust deed.

The Solicitor General advances the *Porter* case as opposed to our position. As we have pointed out on pages 48-50 of our main brief, Mr. Justice Butler's reasoning does not lend itself to this view. Starting with the premise that the non-beneficial power to modify there involved "did not amount to an estate or interest in the property", he sustained the inclusion of the corpus on the somewhat narrow ground



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that what was reached reasonably might be deemed "a substitute for testamentary disposition." But, says the Solicitor General, the significant thing is that the inclusion of the property was upheld in spite of the fact that the trusts were created before there was any provision in the estate tax law taxing such transfers. For our purposes, there is no significance in this argument. The *Porter* case merely holds that in the case of such a power there passes at death some kind of right in respect of the property which is sufficient to support the final death tax. For the purposes of this case, we concede that the surrender of a non-beneficial power to modify is an event which may sustain an *inter vivos* tax if Congress so decrees, as it may also sustain a final excise tax upon death. The question here is not one of legislative power or lack of power; it is wholly one of legislative intention.

#### ***The Pari Materia Argument.***

The Solicitor General (p. 42) misconstrues Mr. Justice Cardozo's comment in the *Guggenheim* case that the gift tax and the estate tax are in *pari materia*, just as Judge Swan misconstrued the statement. The Solicitor General on pages 42 and 43 sets forth *in extenso* the paragraph of Mr. Justice Cardozo's opinion which contains this statement, and perhaps a perusal of the entire paragraph may best indicate what the Learned Justice really had in mind. Directly following this statement and quite evidently directing his attention to the gift tax, the Learned Justice said:

"There is little likelihood that the lawmakers meant to narrow the concept, and to revert to a construction that would exalt the form above the substance, in fixing the scope of a transfer for the purposes of Part II [i. e. the gift tax]."

After saying that the estate tax was "the outcome of a long process of evolution", he added:

"The tax on gifts was something new. Even so, the concept of a transfer [i. e. the shift of economic benefits] so painfully developed in respect of taxes on estates, was not flung aside and scouted in laying this new burden upon transfers during life. Congress was aware that what was of the essence of a transfer had come to, be identified more nearly with a change of economic benefits than with technicalities of title."

Thus it is clear, as we point out on page 45 of our main brief, that Mr. Justice Cardozo's statement was simply in support of his main thesis that form should not be exalted over substance. To this extent, the gift tax and the estate tax are in *pari materiu*. But this is a long way from saying, as Judge Swan said in the *Hesslein* case, that the two statutes are so closely akin that it is reasonable to construe the gift tax "as excluding gifts so incomplete by reason of powers reserved to the donor, as to be expressly made subject by the latter to the estate tax." Here lies the fundamental fallacy in Judge Swan's reasoning.

***The Argument Predicated on the Secondary Liability of the "Donee".***

We have already covered this point (p. 11, *supra*) in discussing the Solicitor General's argument in Part I of his brief (in support of our position). In Part II, the Solicitor General undertakes to counter on his own argument earlier advanced on pages 31-32, but only in a rather half-hearted fashion. He says (pp. 48-49) that the correlation argument "is bolstered" by a consideration of Section 510 imposing a secondary liability upon "the donee". We think not, for the reasons which we have already set forth on pages 9 *et seq.*, *supra*.

We have already considered the argument predicated upon the later substitution of a charity (see p. 18, *supra*).

***The "Basis" of the Hesslein Case.***

At several points in his brief the Solicitor General misinterprets "the basis" of Judge Swan's reasoning in the *Hesslein* case (See pp. 13, 15, 21, 29). For example, on page 13 the Solicitor General says:

"That decision was based upon the premise that the gift and estate taxes were intended to be correlative and that since the termination by death of a power of modification effects a transfer subject to the estate tax [citing the *Porter* case], the termination of such a power by the donor during his life should be deemed to be the taxable event for purposes of the gift tax."

This is not Judge Swan's reasoning at all. Such reasoning might equally well be urged in support of our position. The Estate Tax Act covers property subject to a power to revoke as well as property subject to a power to modify, and it might equally well be said that since the termination by death of a power of revocation constitutes a transfer subject to the estate tax, the termination of a power of revocation by the donor during his life should be deemed to be the taxable event for the purposes of the gift tax.

Judge Swan went far beyond this. Saying that the primary purpose of the gift tax is to supplement the estate tax, he asserted that the gift tax should be construed "as excluding gifts so incomplete by reason of powers reserved to the donor, as to be expressly made subject" to the estate tax. Judge Swan's argument is that so long as property remains within the scope and orbit of the estate tax, the gift tax does not attach, even though the language of the act lays the

tax on the *inter vivos* "transfer \* \* \* by gift". Only if we fully realize Judge Swan's approach do we see how fundamentally fallacious it is.

### III.

#### Comments on the arguments of the respondent in the *Humphreys* case.

In considering the arguments advanced by the respondent in No. 37, three points must be clearly kept in mind with respect to that case.

First, the trust indenture made a complete disposition of the estate, *i.e.* to the grantor for life with remainders over, part vested and part contingent, subject to the power reserved.

Second, the gift there involved was the value of the remainder only (a future interest), since the grantor named himself as the life tenant.

Third, under *Humphreys'* argument, the reserved power to modify, if never surrendered, will frustrate the gift tax entirely; the grantor will remain subject to the income tax so long as the reserved life estate stands. If, however, the grantor, acting under the power to modify, substitutes another as life beneficiary, no gift tax will be payable in respect of the transfer of the life estate, and the grantor will be free from the burden of the income tax. *Knapp v. Hoy*, 104 F. (2d) 99 (discussed on p. 31 of our main brief), recently followed and applied in *Corning v. Commissioner*, C.C.A. 6th, decided June 6, 1939, 1939 Com. Cl. H., Vol. 4, p. 10291, and *Commissioner v. Perkins*, C.C.A. 1st, decided June 13, 1939, 1939 Com. Cl. H., Vol. 4, p. 10335. This is a very nice tax scheme indeed, for under it the grantor and not the Treasury will control the imposition of taxes, assuming, of course, that *Humphreys'* argument is sound.



The respondent in No. 37 adopts (p. 5) "many of the arguments" advanced by the Solicitor General in Part II of his brief. These we have already dealt with. We shall consider briefly certain of his additional contentions.

Humphreys says (p. 7) that the Second Circuit in the *Hesslein* case had "practically the same arguments" before it as are now advanced, adding that many taxpayers undoubtedly have adjusted their financial affairs in reliance upon the *Hesslein* case. We respectfully submit that the first comment is not accurate (see p. 12 of our main brief), and the second is highly doubtful, for the *Sanford* case was instituted immediately upon the decision in the *Hesslein* case, and everyone, including the informed taxpayers of the country, at once realized that the *Hesslein* decision was not the last word.

In the footnote at the bottom of page 11, Humphreys argues that the phrase "put beyond recall" as Mr. Justice Cardozo used it in the *Guggenheim* case means that the grantor "can no longer withdraw the benefit from the named *cestui*." A reading of the phrase in its context will, we submit, indicate clearly that the Learned Justice used it in the sense of beyond recall to the grantor.

On page 11, Humphreys argues that the gift remains imperfect since "he had assured no economic benefit to anyone". This is not the case. On the execution of the trust indenture, Humphreys divested himself of all beneficial interest with respect to the remainder and cast it in others absolutely and forever. The group within which a change may occur is a broad group, perhaps, but it nevertheless explicitly excludes the grantor.

Humphreys asserts (p. 15) that there are three essential elements in a legal gift, namely, a donee capable of taking, an irrevocable relinquishment of

dominion and control, and an absolute and *in presenti* transfer to the donee. Whether these are or are not essential elements is beside the point. An irrevocable gift in trust subject to contingencies in the trust deed unquestionably is a valid gift in trust and recognized as such. Similarly, a trust of the character involved in the *Sanford* case and a trust of the character involved in the *Humphreys* case is also undeniably a valid and effective gift in trust. Humphreys himself would be the first to deny that the instrument which he had executed was futile and ineffective. From the standpoint of the validity of the gift and the completeness of the transfer, the donee is the trustee as the representative of all interests, present and future, and all persons, determined and undetermined.

Humphreys' argument (pp. 16-17) predicated upon "the bundle of rights" constituting the property is also beside the point. On the creation of the trust, Humphreys surrendered rights of ownership sufficient to support an excise tax on "a transfer \* \* \* by gift." In the case of a gift in trust, it is this transfer on which, we submit, Congress intended to lay the tax.

Humphreys refers (p. 18) to Section 504(b) of the 1932 Act conferring a specific exemption of \$5,000 "in the case of gifts (other than a future interest in the property) made to any person". In the case of a gift in trust, the question is still open whether under this section there is only one \$5,000 exemption or several exemptions depending on the number of beneficiaries named. The Board of Tax Appeals consistently has held that "any person" means the trust estate, and allows only one exemption. *Hutchins v. Commissioner*, 40 B. T. A. 27 and cases cited. We are inclined to think this is a sound interpretation. But certainly the question now before this Court is not affected by a possible ambiguity in the meaning of Section 504(b).

On pages 20 and 21, Humphreys indulges in a number of assumptions, such as, for example, the tentative designation of a charity as the recipient of the income and the later substitution of non-charitable beneficiaries. Such suggested cases serve only to belabor the primary issue here involved, and will properly be treated by the Commissioner when they arise. In the case suggested, the Commissioner might appropriately impose a tax on the creation of the trust, so that in order to obtain the exemption it must be shown that the specified gift will be devoted "*exclusively*" to charitable uses.† There is no greater hardship in imposing a gift tax in such a case than there is in imposing an estate tax in respect of property which, though initially enjoyed by a charity, may be diverted to non-charitable uses, or which, in the first instance, is contingently left to a charity. In both instances the rule is well established that the property nevertheless is subject to the estate tax. *Regulations* 80, Art. 1. *Humes v. U. S.*, 276 U. S. 487.

### In summary.

Whatever the approach may be, whether it be in the language of the Gift Tax Act itself, the consistent and uniform rule of the Regulations fortified by the language of the income tax provisions and the declared purpose of Congress in enacting the statute or the practical considerations weighed from the standpoint of the preservation of the revenue and the prevention of gift tax frustration and income tax avoidance, surely the sound and equitable rule for gift tax purposes is the rule resting upon the grantor's power or lack of power to enjoy for himself.

† See Article 16 of Regulations 79 (the Gift Tax Regulations) which provides that if a gift is made to a charity and the charity "is empowered to divert a part of the property or fund to a non-charitable purpose, to that extent the charitable exemption is denied."

self the economic benefits of the property. If, in view of the character and terms of the reserved power, the grantor may enjoy for himself the corpus and income, there is a retention of those fundamental property rights which negatives the existence of a taxable transfer. If, on the other hand, the grantor has irrevocably surrendered such rights and the enjoyment is lodged finally and for all time in others, it would seem that a taxable transfer has occurred and that a gift tax should be collected at that point, even though the grantor retains enough power to redesignate the recipients of his bounty. So construed, the Gift Tax Act is directly in harmony with the income tax provisions and the income tax decisions; so construed, it carries out one of the declared purposes of Congress in enacting the statute; so construed, it will avoid the dangers and pitfalls of tax postponement and tax avoidance; and so construed, it will fully implement and protect the estate tax and prevent estate tax avoidance. Considerations of this character are implicit in any question involving a search for the intention of the lawmakers.

### ***Conclusion.***

In conclusion, it is respectfully submitted that the decision of the Circuit Court of Appeals for the Third Circuit should be reversed, and the case remanded, with the direction to enter a judgment of no deficiency.

Respectfully submitted,

JOHN W. DAVIS,  
MONTGOMERY B. ANGELL,  
OTIS T. BRADLEY,  
WILLIAM A. CARR,  
MARVIN LYONS,  
*Attorneys for the Petitioner.*

Dated, October 14, 1939.





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CLERK

No. **34**

**In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

**ESTATE OF CHARLES HENRY SANFORD, DECEASED,  
JENNIE R. BAIRD, ADMINISTRATRIX, C. T. A.,  
PETITIONER**

**v.**

**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE**

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT**

**MEMORANDUM FOR THE RESPONDENT**



# **In the Supreme Court of the United States**

○ OCTOBER TERM, 1938

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No. 881

ESTATE OF CHARLES HENRY SANFORD, DECEASED,  
JENNIE R. BAIRD, ADMINISTRATRIX, C. T. A.,  
PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT

---

## **: MEMORANDUM FOR THE RESPONDENT**

We do not oppose the granting of a writ of certiorari in this case.

The court below has in the present case followed the reasoning of the majority opinion in *Hesslein v. Hoey*, 91 F. (2d) 954 (C. C. A. 2d), certiorari denied, 302 U. S. 756, stating, however, that had it not been for the ruling by the Second Circuit and the action of this Court in denying certiorari it would have favored a different view. This statement by the court below and the dissent in the *Hesslein* case indicate that the question involved

(1)

— is not free from doubt. Because of the uncertainty of the ultimate decision and the varying position of the taxpayers the Government has, since the *Hesslein* decision, taken both sides of the question in order to protect itself. See *Humphreys v. Rasquin*, 101 F. (2d) 1012 (C. C. A. 2d), in which the Government is filing a petition for certiorari.

As was pointed out in the petition for certiorari in the *Hesslein* case, the Government feels that it is important in the administration of the revenue laws that the question of statutory construction here presented be settled, and accordingly it does not oppose the granting of the writ in the instant case.

Respectfully submitted.

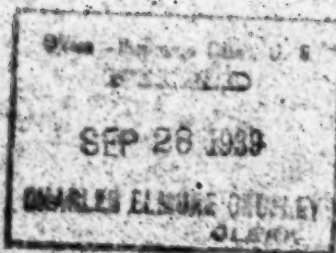
ROBERT H. JACKSON,  
*Solicitor General.*

APRIL 1939.









Nos. 34 and 37

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**In the Supreme Court of the United States**

OCTOBER TERM, 1939

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ESTATE OF CHARLES HENRY SANFORD, DECEASED,  
JENNIE R. BAIRD, SUBSTITUTIONARY ADMINISTRA-  
TRIX, C. T. A., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

---

ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVE-  
NUE OF THE UNITED STATES FOR THE FIRST DIS-  
TRICT OF NEW YORK, PETITIONER

v.

GEORGE ARENTS HUMPHREYS

---

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURTS OF APPEALS FOR THE THIRD AND SECOND CIR-  
CUITS, RESPECTIVELY

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BRIEF FOR THE RESPONDENT IN NO. 34 AND FOR THE  
PETITIONER IN NO. 37

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# In the Supreme Court of the United States

OCTOBER TERM, 1939

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No. 34

ESTATE OF CHARLES HENRY SANFORD, DECEASED,  
JENNIE R. BAIRD, SUBSTITUTIONARY ADMINISTRATRIX, C. T. A., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

---

No. 37

ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK, PETITIONER

v.

GEORGE ARENTS HUMPHREYS

---

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURTS OF APPEALS FOR THE THIRD AND SECOND  
CIRCUITS, RESPECTIVELY

---

BRIEF FOR THE RESPONDENT IN NO. 34 AND FOR THE  
PETITIONER IN NO. 37

---

OPINIONS BELOW

*Sanford Estate* case. The memorandum opinion of the United States Board of Tax Appeals (R. 33-35) is unreported. The opinion of the Circuit

Court of Appeals (R. 173-177) is reported in 103 F. (2d) 81.

*Humphreys* case. The District Court rendered no opinion. The *per curiam* opinion of the Circuit Court of Appeals (R. 28) is reported in 101 F. (2d) 1012.

#### JURISDICTION

*Sanford Estate* case. The judgment of the Circuit Court of Appeals was entered March 25, 1939 (R. 178). Petition for a writ of certiorari was filed April 17, 1939, and was granted May 15, 1939 (R. 178-179). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

*Humphreys* case. The judgment of the Circuit Court of Appeals was entered February 10, 1939 (R. 28-29). The petition for a writ of certiorari was filed April 27, 1939, and was granted May 22, 1939 (R. 29). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Both cases involve *inter vivos* trusts in which the donor retained no right to revoke the trust or to revest title to the corpus in himself, but reserved the right to modify the trust deed and change the beneficiaries in any manner not increasing his own beneficial interest in the trust estate. The single question presented in both cases is whether, under the gift tax provisions of the Revenue Acts of

1924 and 1932, the taxable transfer occurs (1) at the time when the donor relinquishes all beneficial interest in the trust property, even though retaining the power to modify the trust deed and change the beneficiaries, or (2) at the time when the power of modification and change is relinquished.

#### STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra*, pp. 51-58.

#### STATEMENT

##### 1. Sanford Estate case

The facts in this case as stipulated (R. 10-33, 46-173) and found by the Board of Tax Appeals (R. 33-35) may be summarized as follows:

On December 24, 1913, Charles Henry Sanford, a resident of New Jersey, transferred certain securities to the Guaranty Trust Co. of New York as trustee (R. 11, 46-54). The original trust indenture (R. 46-54) provided that the trustee should hold the trust property subject to the payment of an indebtedness of the grantor to the Trust Company, and also provided for the payment of certain annuities out of income (R. 47-48). The trustee was directed to set apart \$150,000 in securities in trust for a great-grandson (R. 48) and to divide the remainder of the property into five equal shares in trust for the benefit of each of five grandchildren, with provision for the disposition of each share on the death

of each grandchild.<sup>1</sup> The grantor reserved the right to augment the corpus of the trusts and the right to terminate or modify any or all of them by a suitable instrument in writing filed with the trustee (R. 51-52).

Several supplemental indentures modifying the trusts were executed by the decedent (R. 46), but no change was made in the power reserved to the grantor to terminate or modify the trusts until November 26, 1919 (R. 90-92). On that date the grantor executed a supplemental indenture changing this reserved power to read as follows (R. 91):

The party of the first part, however, reserves the right to modify any or all of the trusts herein created by suitable instruments in writing executed under his hand and seal and duly acknowledged as a deed of real estate is required to be acknowledged under the laws of the State of New York, and filed with the party of the second part; but this right of modification, however, shall in no way be deemed or construed to include any right or privilege in the party of the first part to withdraw principal or income from any trust created by this instrument.

On August 21, 1924, the remaining power of modification reserved to the grantor was relin-

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<sup>1</sup> The beneficiaries of two of the trusts predeceased the grantor and the property reverted to the grantor, who added it to the other trusts (R. 65-75, 99-128).

quished pursuant to the following provisions of another supplemental indenture (R. 171):

The party of the first part hereby renounces all rights to further modify the terms of the said trusts or any of them and does hereby surrender all such rights reserved to him by the indenture of December 24th, 1913, and by the various indentures supplemental thereto.

Sanford did not file a gift tax return for 1924 (R. 34). He died in 1928 and the administrator of his estate, after a revenue agent had raised the question as to whether the surrender in 1924 of the power to modify the trusts subjected the transfer to a gift tax at that time, filed a gift tax return with the Collector of Internal Revenue for the District of New Jersey (R. 34). The property held by the trustee on August 21, 1924, was listed in the return, but the administrator, on behalf of the estate, disclaimed any liability for the tax (R. 34). The aggregate value of the property held in the trusts as of that date was \$6,846,225.06 (R. 11).

Conferences were thereafter held between representatives of the taxpayer and representatives of the Government (R. 12). A tentative ruling of the Bureau of Internal Revenue held that the gifts were made in 1924, when the power of modification was relinquished, and hence were subject to tax under the gift tax provisions of the Revenue Act of 1924 (R. 21-28). A later ruling held that the trans-



fers became effective on November 26, 1919, when the grantor relinquished his right to terminate the trusts or to modify them in such a way as to enable him to withdraw principal or income, and that since the gifts were completed before any gift tax law became effective, they were not subject to any gift tax (R. 14-21, 34). This ruling was approved by the Under Secretary of the Treasury (R. 32-33, 34), and the petitioner was notified on April 19, 1935, that the gift tax return for 1924 disclosed no tax liability and the case had been marked closed (R. 29, 34). However, the ruling was revoked by the Bureau after the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Hesslein v. Hoey*, 91 F. (2d) 954, certiorari denied, 302 U. S. 756, and on October 16, 1937, the Commissioner mailed a notice of a deficiency in the amount of \$1,000,745 (R. 6, 29-32, 33-34).

Joseph McDermott, as administrator *cum testamento annexo* of Sanford's estate, filed a petition for review in the Board of Tax Appeals (R. 2). McDermott died June 10, 1938, and Jennie R. Baird was duly appointed to succeed him. By order of the Circuit Court of Appeals dated September 2, 1938, Jennie R. Baird was substituted as the petitioner in that court:

The Board of Tax Appeals sustained the determination of the Commissioner, holding that the transfers were subject to the gift tax imposed by the Revenue Act of 1924. The Circuit Court of Appeals affirmed that decision.

## 2. Humphreys case

This action was instituted against the Collector of Internal Revenue for the refund of a gift tax paid for 1934 (R. 6-8). The plaintiff, who is the respondent in this Court, filed a motion for summary judgment pursuant to Rule 113 of the New York Rules of Civil Practice (R. 4-6). The District Court granted the motion (R. 2-3) and entered judgment for the plaintiff in the sum of \$11,181.14, plus interest and costs (R. 3-4). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 28-29).

The essential facts appear in the complaint (R. 6-8) and the exhibits attached thereto (R. 8-26) as follows:

On December 27, 1934, the respondent, a resident of New York, executed a trust indenture conveying certain property to George Arents, Jr., Harold W. Brooks, and United States Trust Company of New York, in trust for certain uses and purposes (R. 6, 8-20, Ex. A). The trustees were directed to receive, hold, manage, sell, invest, and reinvest the corpus of the trust, to collect the income thereof, and, after deducting expenses of the trust, to pay over the net income to the settlor during his life (R. 9). Upon the settlor's death, one-half of the then corpus was to be paid to George Arents, Jr., or his issue (R. 9). In the event that Harold W. Brooks survived the settlor, the remaining one-half of the corpus was to be held in

trust and the annual net income therefrom paid to Brooks until the death of Brooks or of George Arents III, whichever should first occur; whereupon that trust was to terminate and the corpus be paid to the survivor of them (R. 9). If Brooks did not survive, this half of the corpus was to be paid over to George Arents III absolutely (R. 9). The indenture contained alternative provisions for the disposition of the corpus to others in the event that those designated to receive it did not survive (R. 9-10).

Paragraph Seventh of the indenture provided as follows (R. 12-13):

This trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be capable of modification in any manner, except that the Settlor reserves the right, without the consent of the Trustees or of any beneficiary hereunder, at any time and from time to time during his life, by an instrument or instruments in writing under his hand and duly acknowledged so as to authorize it or them to be recorded in the State of New York, to alter and amend this Trust Deed to the extent of substituting for the beneficiaries named herein other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust, but the Settlor shall not by any such alteration or amendment increase his personal beneficial interest in the trust estate.

On March 12, 1935, the respondent filed with the petitioner a gift tax return for the calendar year 1934 (R. 6-7, 20-22, Ex. B), in which he reported the value of the remainder interests conveyed under this indenture as a taxable gift in the amount of \$263,201.71. The tax due thereon in the amount of \$11,181.14 was paid to the petitioner on March 12, 1935 (R. 7).

On February 17, 1938, the respondent filed a claim for refund of the amount paid (R. 7, 23-25, Ex. C) based on the allegation that the transfer pursuant to the trust indenture did not constitute a gift taxable under the gift tax provisions of the Revenue Act of 1932. On March 11, 1938, the claim was rejected (R. 8, 25-26, Ex. D), whereupon this suit was instituted.

When respondent's motion for summary judgment was filed, petitioner's counsel filed no papers in opposition. He stated to the court that the case was apparently controlled by *Hesslein v. Hoey*, 91 F. (2d) 954 (C. C. A. 2d), but that the Commissioner had not acquiesced in that decision (R. 2-3). In granting the motion for summary judgment and entering judgment for the respondent, the District Court rendered no opinion. On appeal the court below affirmed, *per curiam*, on the authority of *Hesslein v. Hoey*.

**SPECIFICATION OF ERRORS TO BE URGED IN THE  
HUMPHREYS CASE**

The Circuit Court of Appeals erred:

1. In holding that the transfer in trust, by the terms of which the settlor reserved the power to alter or amend the trust deed by substituting other beneficiaries for the beneficiaries named and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust but without the power to increase his personal beneficial interest in the trust estate, is not such a transfer as is subject to tax under the gift tax provisions of the Revenue Act of 1932, as amended; and in failing to hold that the transfer in trust is subject to tax under the gift tax provisions of the Revenue Act of 1932, as amended.

2. In affirming the judgment of the District Court.

**SUMMARY OF ARGUMENT**

The two cases at bar present a single question of statutory interpretation, namely, whether, in the case of an *inter vivos* transfer in trust, a "gift" subject to taxation under the gift tax law is made (1) when the donor relinquishes all beneficial interest in the property even though reserving a power to modify the trust and change the beneficiaries, or (2) when such reserved power of modification and change is relinquished.

The Government believes that almost equally cogent arguments may be advanced in support of either view. Therefore, to protect its interests



pending an authoritative decision by this Court, the Government has necessarily been forced to take inconsistent positions in different cases. In the *Sanford Estate* case it has taken the position that relinquishment of the power of modification constitutes the taxable gift, while in the *Humphreys* case it has taken the position that relinquishment of the donor's beneficial interest in the property, irrespective of the reservation of a power of modification, constitutes the taxable gift. A decision favorable to the Government in either case will necessarily preclude a favorable decision in the other.

Because of a genuine doubt as to the proper interpretation of the statute and because we do not believe that a decision either way will have a predictable effect upon Federal revenues, we do not feel justified in urging upon the Court adoption of either view to the exclusion of the other. Consequently, we will set forth in this brief all of the arguments which we believe may legitimately be made for each position.

## I

The view that the gift tax should be imposed when the donor relinquishes power to revest title in himself is based on the theory that a completed gift has been made by the donor as soon as he ceases to have any beneficial interest in the property, even though there is no completed gift to any particular donee or donees. This view is sup-

ported by the language of the Revenue Act, which imposes a tax upon "the transfer \* \* \* by gift \* \* \* of any property," rather than a tax upon the receipt of property. Moreover, since the donor is the one primarily liable for the tax, it seems most consistent with the philosophy of the tax to levy it when the transfer of property rights by him is complete and to base the amount of the tax upon the then value of the trust estate. *Burnet v. Guggenheim*, 288 U. S. 280, insofar as it stresses as the taxable event the divestment by the donor of his beneficial interest in the trust estate, lends support to this view.

The Treasury Regulations applicable to the cases at bar, while they do not specifically cover the present situation, contain the implication that the tax is to be imposed when the grantor relinquishes his beneficial interest in the property rather than when he relinquishes his power of modification. They were so interpreted in *Hesslein v. Hoey*, 91 F. (2d) 954 (C. C. A. 2d), although the court refused to follow them because they were of comparatively recent adoption. If the regulations are to be interpreted as directing imposition of the tax when the grantor completes the transfer of his property rights, even though reserving a power of modification as to the donees, there is persuasive reason for believing that they should be considered as accurately reflecting the legislative intention, since the regulations promulgated under the gift tax provisions of the Revenue Act of 1924 were subsequently

incorporated into the Revenue Act of 1932 as Section 501 (c). See *Burnet v. Guggenheim*, *supra*.

*Hesslein v. Hoey*, *supra*, is direct authority against the view supported in this portion of the brief. That decision was based upon the premise that the gift and estate taxes were intended to be correlative and that since the termination by death of a power of modification effects a transfer subject to the estate tax (*Porter v. Commissioner*, 288 U. S. 436), the termination of such a power by the donor during his life should be deemed to be the taxable event for purposes of the gift tax. While there is force in this position, fundamental differences between the estate and gift taxes may not be overlooked. *Porter v. Commissioner* was based squarely on the express provisions of Section 302 (d) of the Revenue Act, which specifically subjects to the estate tax the termination by death of a power of modification; the gift tax statute contains no similar provision. The inference may logically be drawn that had Congress desired to impose a gift tax upon the surrender of a power of modification, just as the estate tax is imposed upon the termination of such power by death, it would not have left its intention equivocal, but would have inserted in the gift tax statute provisions analogous to those embodied in the estate tax law.

No question of double taxation would be involved in a holding that the gift tax attaches to the creation of a trust in which a power of modification is reserved, even though the subsequent termination

by death of the reserved power is subject to an estate tax, since Congress has specifically provided that the gift tax shall be credited against the estate tax. That Congress deemed it necessary to provide for this credit is an indication that it did not intend the two taxes to be entirely correlative.

## II

The view that the gift tax should be imposed only when the donor surrenders his power of modification is based on the theory that a gift requires a donee as well as a donor and cannot be said to be complete until the donor has fully exercised his right to choose the objects of his bounty. The control which the donor retains over the ultimate disposition of the trust estate is susceptible of such exercise as to afford him considerable economic benefit from the property and gives him an interest in the trust estate which in its effect is closely akin to a property right. Until this interest is transferred by relinquishment of the reserved power, the transfer in trust may logically be deemed an imperfect gift.

*Porter v. Commissioner, supra*, lends support to this view. In that case this Court, construing Section 302 (d) of the estate tax as imposing a tax upon the termination by death of a reserved power of modification, held the section to be valid as applied to trusts created before there was any provision in the estate tax law subjecting them to tax.

If the transfers by the donor had been deemed complete when made, the tax could not have been applied retroactively. *Helvering v. Helmholz*, 296 U. S. 93.

In *Burnet v. Guggenheim*, *supra*, this Court indicated its opinion that the gift and estate taxes were intended to be correlative. Since the termination of a reserved power of modification is subject to the estate tax upon the death of the grantor, *Burnet v. Guggenheim* is persuasive authority that termination of such power by the donor during his life is the taxable event for purposes of the gift tax. The Circuit Court of Appeals for the Second Circuit expressly so held in *Hesslein v. Hoey*, *supra*, a decision specifically based upon the premise that the two transfer taxes were designed as correlative. This premise is amply supported by the legislative history of the gift tax statutes.

The correlation argument is bolstered by the fact that Section 510 of the gift tax law imposes a secondary liability upon the donees for payment of the tax. If, as the Circuit Court of Appeals held in the *Hesslein* case, imposition of the tax at the creation of the trust means that the named beneficiaries are secondarily liable for the tax under Section 510 even though they may subsequently be deprived of all interest in the property, an incongruous situation would be created. Moreover, if a gift tax is imposed on a transfer in trust before the donor has irrevocably chosen the beneficiaries,



it would result in taxing an otherwise exempt charitable gift if the donor should ultimately decide to change the named beneficiaries and substitute a charity.

## ARGUMENT

### Introductory statement

The two cases at bar present a single question of statutory interpretation, namely, whether, in the case of an *inter vivos* transfer in trust, a "gift" subject to tax under the gift tax law is made (1) when the donor relinquishes all personal beneficial interest in the property even though reserving a power to modify the trust and change the beneficiaries, or (2) when such reserved power of modification and change is relinquished.

The Government believes that almost equally cogent arguments may be advanced in support of either view. Therefore, to protect its interests pending an authoritative decision by this Court, the Government has necessarily been forced to take inconsistent positions in different cases. In the *Sanford Estate* case, the Government has taken the position that the relinquishment of a power to modify a trust constitutes a taxable gift even though, at the time of such relinquishment, the donor had no power to revoke the trust or to increase his own beneficial interest therein. In the *Humphreys* case, on the other hand, the Government has taken the position that the creation of a trust whereby the grantor irrevocably parts with

all beneficial interest in the trust estate constitutes a taxable gift despite a reservation in the grantor of a broad power of modification. A decision favorable to the Government in either case will necessarily preclude a favorable decision in the other.

Because of a genuine doubt as to the proper interpretation of the statute and because we do not believe that a decision either way will have any predictable effect upon the aggregate amount of Federal revenues, we do not feel that the Government would be justified in urging upon the Court the adoption of either view to the exclusion of the other. Consequently, we will set forth in this brief all of the arguments which we believe may legitimately be made for each position.

Presentation of the arguments in favor of the Government's position in each of the cases will be facilitated by first considering the precise nature of the issue and the applicability to that issue of the three principal cases bearing on the problem—*Burnet v. Guggenheim*, 288 U. S. 280; *Porter v. Commissioner*, 288 U. S. 436; and *Hesslein v. Hoey*, 91 F. (2d) 954 (C. C. A. 2d), certiorari denied, 302 U. S. 756.

There is and can be no dispute that Congress has the power to levy a gift tax either upon the creation of a trust in which the grantor reserves a power of modification, or upon the relinquishment of that reserved power. Both acts cause "a change

of legal rights and a shifting of economic benefits" which Congress may tax as a transfer effected at that time. *Burnet v. Guggenheim, supra*, at 284-285. The question, therefore, is one of legislative intention and not of legislative power. Concededly, "Congress did not mean that the tax should be paid twice, or partly at one time and partly at another" (p. 285). If the creation of a trust with a reserved power of modification is a present transfer by gift within the meaning of the Congressional enactment, the relinquishment of the reserved power is not such a transfer. Decision, therefore, depends upon determination of which of the two donative acts Congress intended to tax.

A similar choice was presented in *Burnet v. Guggenheim, supra*, where the question was whether the creation of a revocable trust or the extinguishment of the power of revocation constituted the taxable transfer by gift. The opinion of this Court, holding that Congress intended to impose the tax upon extinguishment of the power, can be used as the basis of an argument on either side of the issue involved in the present cases. Insofar as it stresses as the taxable event the divestment by the donor of his beneficial interest in the trust estate, it tends to support the view that creation of the trust or relinquishment of the power of revocation constitutes the "gift" which Congress subjected to tax, irrespective of the existence of a

power of modification. Insofar, however, as the holding is predicated upon the conviction that Congress intended the gift and estate taxes to be correlative it supports the conclusion that the taxable event is the relinquishment of the power of modification. Under the federal estate tax law, the value of property transferred by a deed of trust reserving to the grantor a power of modification but no power to make a change in favor of himself or his estate is properly included in the gross estate of the grantor. *Porter v. Commissioner, supra.*

Significant differences between the provisions of the gift tax and of the estate tax may not be ignored in determining the weight to be given *Porter v. Commissioner* in decision of the present issue. That decision was based squarely on the express language of the estate tax law, which provides that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke \* \* \*." Section 302 (d). The gift tax statute contains no such provision, being imposed merely "upon the transfer \* \* \* by gift \* \* \*

of any property.”<sup>2</sup> Unless, therefore, this Court holds as a matter of statutory construction that Congress intended the general language of the gift tax to be construed in the light of the specific language of the estate tax, the decision in *Porter v. Commissioner* is far from decisive of the present issue.

Certainly a decision in the present cases that relinquishment of the donor's beneficial interest in the trust property rather than relinquishment of his power of modification constitutes the taxable event would not be inconsistent with or throw any doubt upon the *Porter* case. As already stated, Congress could tax either act. In the case of the estate tax it has specifically indicated its intention to tax the transfer resulting from termination of the power of modification, while in the case of the gift tax its intention is left unexpressed. No inconsistency would be involved in holding that Congress intended the gift and estate taxes to be im-

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<sup>2</sup> Revenue Act of 1924, Sec. 319. Section 501 (a) of the Revenue Act of 1932 imposes a tax “upon the transfer . . . of property by gift.” Section 501 (b) provides that the tax shall apply whether the transfer is in trust or otherwise. Section 501 (c) provides that the tax shall not apply to the creation of a revocable trust but that the relinquishment or termination of the power of revocation, otherwise than by the donor's death, shall be considered a taxable gift. As is pointed out below, Section 501 (c) was repealed after the decision of this Court in *Burnet v. Gugenheim*, *supra*, on the ground that subdivision (c) added nothing to, but was merely declaratory of, the provisions of subdivision (a).



posed upon different types of transfers, nor, as pointed out below (*infra*, pp. 34-35), would such a holding result in any problem of double taxation.

The *Porter* case was relied upon by the Circuit Court of Appeals for the Second Circuit to reach its decision in *Hesslein v. Hoey, supra*, that the gift tax attaches to the relinquishment of a power of modification rather than to a transfer of the donor's beneficial interest in the trust property subject to such power of modification. The court, citing *Burnet v. Guggenheim* for the proposition that the gift and estate taxes are in *pari materia* and must be construed in conjunction, held that since the estate tax is imposed only when the power terminates by the death of the donor, termination of the power by the donor during his life must be the taxable event for purposes of the gift tax. Judge A. N. Hand dissented.

Both of the present cases were decided by the courts below on the authority of *Hesslein v. Hoey*.

## I

THE ARGUMENT IN SUPPORT OF THE GOVERNMENT'S POSITION IN THE HUMPHREYS CASE THAT A TAXABLE GIFT IS MADE WHEN THE DONOR IRREVOCABLY TRANSFERS HIS BENEFICIAL INTEREST IN THE TRUST PROPERTY EVEN THOUGH RESERVING A POWER TO MODIFY THE TRUST DEED AND CHANGE THE BENEFICIARIES

The creation of a trust whereby the grantor gives up all beneficial interest in the trust estate is unquestionably a completed transfer of property rights from the standpoint of the donor. Whether

or not he reserves the power to modify the trust and change the beneficiaries, he has irrevocably given up all property interest in the *res* and all power to revest title in himself. Only from the viewpoint of the donee or donees is the transfer inchoate, since until the reserved power of modification is relinquished or terminates, there is no perfected gift to any particular beneficiaries and the ultimate beneficial takers must remain undetermined.

The language of the gift tax law affords persuasive reason for believing that the completion of the transfer from the donor rather than the completion of the gift to particular donees is the decisive factor. It is "the transfer \* \* \* by gift \* \* \* of any property" which is the subject of the tax, not the receipt of such property.<sup>2</sup> Unquestionably there was, in both cases at bar, a completed transfer of property when the power of revocation was relinquished. If the incidence of the tax is upon such a transfer rather than upon the receipt of the property by the ultimate beneficiaries, the fact is unimportant that the donor, by reserving the right to change the beneficiaries, had power completely to alter the disposition of the income and corpus of the estate.

—This construction of the statute is supported by the fact that the donor is the one primarily liable for the tax. This would seem to indicate that the

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<sup>2</sup> See footnote 2, page 20, *supra*.

irrevocable divestment of all of the donor's rights in the property, rather than the irrevocable vesting of rights in particular beneficiaries, should be the taxable event. Moreover, because the donor is the taxpayer, selection of the valuation date which most truly measures his donative intent would seem to be most consistent with the philosophy of the tax. When the donor relinquishes all possibility of personal profit from the property subject to the trust, he creates a situation where future fluctuations in the value of that property can have no bearing upon his economic situation. The amount of the gift he has given is the then value of the property placed in trust, and the tax which he must pay can accurately reflect what he has given only if based upon a valuation made at that time.

*Burnet v. Guggenheim, supra*, lends support to the conclusion that the gift is complete when the grantor surrenders the power to retake the property himself. In holding that the relinquishment of a power of revocation rather than the creation of a revocable trust effects the taxable transfer, this Court stressed the fact that the donor's reservation of the power to revoke the transfer made his gift "formal and unreal" and stated that "a gift is not consummate until put beyond recall (p. 286). This language may well be deemed to contain the negative indication that transfers, such as the ones here involved, which are beyond recall and which, therefore, have substance and reality from

the point of view of the donor, do constitute taxable gifts within the meaning of the statute. •

If, as petitioner in the *Sanford Estate* case contends, the decision in the *Guggenheim* case stands for the broad proposition that termination of the donor's power of revocation is a taxable transfer by gift, irrespective of the reservation of any other type of power, the decision would be determinative of the *Sanford Estate* case in favor of the taxpayer and, consequently, determinative of the *Humphreys* case in favor of the Government. Sanford relinquished his power of revocation in 1919 before the enactment of the gift tax, and surrendered his remaining power of modification in 1924. If the *Guggenheim* decision means that any relinquishment of a power of revocation is a taxable gift, the Sanford gift was completed in 1919 and consequently his subsequent renunciation of the power of modification is not subject to tax. However, although this interpretation of the *Guggenheim* case finds considerable support in the language of the opinion, it seems doubtful that the decision may properly be considered as direct authority for any such broad proposition. The relinquishment of the power of revocation there discussed was not accompanied by any reservation of a power of modification and the Court had no occasion to consider the applicability of its decision to such a situation. See *Hesslein v. Hoey*, *supra*.

The Treasury Regulations applicable to the gift tax, while raising somewhat the same problem of

interpretation as that raised by the *Guggenheim* case, may, we believe, be construed as embodying the rule for which the taxpayer contends in the *Sanford Estate* case and as supporting the position of the Government in the *Humphreys* case. Article 1 of Regulations 67 (1924 ed.), promulgated under the Revenue Act of 1924, provides merely that the creation of a trust with a reserved power of revocation should not be deemed to constitute a taxable gift but that "a taxable transfer will be treated as taking place in the year in which such power is terminated." Article 3 of Regulations 79 (1933 ed.) promulgated under the Revenue Act of 1932, is to the same effect.\* Article 3 of Regulations 79 (1936 ed.) promulgated under the Revenue Act of 1932, as amended by the Revenue Acts of 1934 and 1935, is, however, more specific. These regulations provide in part as follows:

The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer.

On the contrary, the tax is a primary and

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\* These regulations provide in part as follows: "The relinquishment or termination, without an adequate and full consideration in money or money's worth, of the power to revest in the donor title to property transferred in trust, is a gift of such property at the time of the relinquishment or termination of the power, except where the power is terminated by the donor's death."



personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. \* \* \* The relinquishment or termination of the power, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. \* \* \*

Regulations 79 above quoted seem clearly to contemplate that the creation of an irrevocable trust or the relinquishment of a power of revocation constitutes a taxable gift irrespective of the reservation of a power of modification. And the same rule may fairly be implied from provisions of the earlier regulations which provide for the imposition of a tax upon the termination of a power of revocation without any exception in the case of a

reserved power of modification. The assumption seems warranted that if the Treasury Department deemed it necessary to promulgate a specific regulation that a transfer of property under a revocable trust was not taxable, it would have promulgated a similar regulation with respect to a trust in which the grantor reserved a power of modification if it had not considered that such a transfer was taxable. In any event, prior to the decision in *Hesslein v. Hoey*, the Bureau of Internal Revenue consistently took the position that the gift tax applied to a transfer in trust where the grantor reserved the right to modify the trust but no right to revest title in himself. Approximately 300 cases were disposed of by the Bureau on that theory, although the administrative practice was not embodied in any published rulings of the Bureau. It should also be noted that in *Hesslein v. Hoey*, the Circuit Court of Appeals construed Article 3 of Regulations 79 (1933 ed.) as providing for the imposition of a tax in a case where the donor reserved a power of modification but no power of revocation, although the court declined to follow the regulation on the ground that it was one of comparatively recent adoption. On the other hand, in the *Sanford Estate* case, the court below held that the regulation did not provide a determinative rule.

If the earlier regulations, which are the ones applicable to the cases at bar, should be construed as containing the negative implication that the reservation of a power of modification does not pre-

vent the creation of an irrevocable trust or the relinquishment of a power of revocation from being a taxable gift, there is persuasive reason for believing that they should be considered as accurately reflecting the legislative intention. The provisions of Article 1 of Regulations 67, which were promulgated under the 1924 Act and which are quoted above, were subsequently given express statutory sanction by being incorporated in substance into the Revenue Act of 1932 as Section 501 (c). See *Burnet v. Guggenheim*, *supra*, at p. 282, in which this Court held that the regulation and the 1932 statute continuing it were declaratory of the law which Congress meant to establish by the Revenue Act of 1924. While Section 501 (c) was repealed after the decision in the *Guggenheim* case by Section 511 of the Revenue Act of 1934, the repeal was only because "the principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court's decision in the *Guggenheim* Case." Consequently, as a matter of Congressional interpretation, the gift tax Act must be read as though the provisions of Section 501 (c), and consequently the earlier Treasury regulation, were part of the law. See dissenting opinion of Judge A. N. Hand in *Hesslein v. Hoey*, *supra*.

The decision of the majority of the court in the *Hesslein* case, as we have pointed out above, is directly opposed to the view advanced in this por-

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\* See H. Rep. No. 704, 73d Cong., 2d Sess., p. 40; S. Rep. No. 558, 73d Cong., 2d Sess., p. 50.

tion of the brief. See also *Rosenau v. Commissioner*, 37 B. T. A. 468. The principal basis of the *Hesslein* decision was the conviction that the estate tax and the gift tax were intended to be correlative and that since the termination by death of a power of modification effects a transfer subject to the estate tax (*Porter v. Commissioner, supra*), termination of such a power during the donor's life should be deemed to be the taxable event for purposes of the gift tax. That there is force in this position is undeniable. The considerations which support it are discussed in the second portion of this brief (*infra*, p. 38 *et seq.*).

But there are also persuasive reasons for believing that Congress did not intend the gift tax law to be construed in the light of the estate tax law. As has previously been stated, the gift tax law differs fundamentally from the estate tax law in that it does not enumerate the types of transfers which are intended to be within the ambit of its operation.\* It may logically be inferred that had Congress desired to subject to the gift tax the same changes in legal rights and economic benefits which, when occurring at death, are specifically subjected to the estate tax, it would not have left its intention equivocal but would have inserted in the gift tax statute provisions similar to those embodied in the estate tax law. While this Court suggested in

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\* See subdivisions (b) to (g) of Section 302 of the Revenue Act of 1924 (c. 234, 43 Stat. 253) and of the Revenue Act of 1926 (c. 27, 44 Stat. 9). U. S. C., Title 26, Section 411.

*Burnet v. Guggenheim* that the concept of a transfer as developed in the estate tax law was not to be disregarded in construing the gift tax law, it nevertheless pointed out that differences in the precision of definition between the two laws could not be ignored.

Congress clearly contemplated that certain transfers, such as those made in contemplation of death, would be reached both by the gift and estate taxes, for it provided for the allowance of a credit against the estate tax for gift taxes.<sup>7</sup> That Congress deemed it necessary to provide for this credit shows that the two laws were not designed to operate so that imposition of a gift tax on a transfer would necessarily preclude imposition of an estate tax with respect to the same transfer, or *vice versa*, and indicates that to a certain extent at least each law was regarded as establishing its own criteria for the imposition of the tax.

Because of this provision for the allowance of a credit, no contention can be made that a decision favorable to the Government in the *Humphreys* case would result in double taxation. The transfer would be subjected to both taxes, but the amount paid as a gift tax would be credited against the estate tax.

The second ground upon which the majority of the court rested its decision in the *Hesslein* case

<sup>7</sup> See Section 322 of the Revenue Act of 1924 (U. S. C., Title 26, Sec. 413) and Sections 402 (b) and 801 of the Revenue Act of 1932 (U. S. C., Title 26, Secs. 413 and 536).



was the fact that, by Section 510 of the Revenue Act of 1932, the donees of a gift are made secondarily liable for payment of the tax, the Court stating that it would be unreasonable to assume that Congress intended to impose such liability upon donees who might subsequently be deprived of all right to receive the trust property. The reasoning of the court is based upon a construction of Section 510, which is not entirely free from doubt. This section provides as follows:

The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift.

While the foregoing language is far from clear, we question whether Congress intended that a beneficiary of a trust who had not received and might never receive any distribution from the trust should be required to pay the gift tax on the transfer in trust in the event that the donor failed to pay. We think it probable that Congress intended that in such event the trust estate should be made to respond for the tax in the first instance by enforcement of the statutory tax lien. If this be true, the provision with respect to the liability of the donee may properly be construed as imposing liability upon him only when the gift to him is completed. In this view, the meaning of the statute is

simply that the donee shall be personally liable for the tax to the extent of the value *to him* of the gift *to him*.

It seems reasonable to assume that if a gift is made in trust for a number of beneficiaries, no single beneficiary is liable, at least beyond the value of the gift to him, for the payment of the gift tax upon the entire transfer should the donor fail to pay. It is not the value of the gift *by the donor* which would seem to measure the extent of the donee's secondary liability under Section 510 but rather the value of the gift *to the donee*. This being so, it would be entirely consistent to hold that the donor is liable for the tax when the gift by him is completed but that the secondary liability of the donee attaches only when the gift to him is perfected and then only to the extent of his interest therein.

Even if this construction is unsound and the beneficiaries named in the trust deed are secondarily liable for the tax despite the grantor's reservation of a power of modification, it does not necessarily follow that undue hardship would be imposed on such beneficiaries. It might well be that, on common law principles, they would have a right of reimbursement from the trust estate or from the ultimate beneficial takers. Cf. *Phillips-Jones Corp. v. Parmley*, 302 U. S. 233. In any event, it seems somewhat strained to determine the legislative intent in the enactment of one ambiguous section of a law by considering the possible hardships which

a particular construction of that section might cause under one of several constructions of another ambiguous section of the law.

We believe the foregoing considerations constitute persuasive reason for a decision by this Court in favor of the Government in the *Humphreys* case and in favor of the taxpayer in the *Sanford Estate* case. On the other hand, the arguments presented in the succeeding section of this brief are, in our view, equally cogent in favor of a contrary ruling. Before proceeding to consider those arguments, however, we wish briefly to discuss some of the contentions advanced in the brief for petitioner in the *Sanford Estate* case with which we are not in entire agreement.

The first of these contentions is based on the decision in *Porter v. Commissioner, supra*. This Court there held that a transfer in trust in which the grantor reserved only a power of modification was subject to the estate tax by virtue of the specific provisions of Section 302 (d) of the Revenue Act of 1926 and stated that such a transfer would not be subject to tax under Section 302 (a) of the Act standing alone. The petitioner in the *Sanford Estate* case urges that Section 302 (a) of the estate tax law and Section 319 of the gift tax law (Revenue Act of 1924) are of the same scope and that the statement of the Court in the *Porter* case that a transfer of the type here involved does not come within the terms of Section 302 (a) is author-

ity that it does not come within the terms of Section 319. (Br. 49-51.)

We believe this contention to be unsound. The operation of Sections 302 (a) and 319 with respect to revocable trusts demonstrates that they are not intended to be correlative. As we have already pointed out, the surrender of a power of revocation constitutes a taxable gift within the meaning of Section 319 (*Burnet v. Guggenheim, supra*), whereas the termination of a similar power through the death of the grantor does not make the trust property subject to estate tax by virtue of Section 302 (a).<sup>\*</sup> *Porter v. Commissioner, supra*, at 442. No property is included in the gross estate by virtue of that section except "To the extent of the interest therein of the decedent at the time of his death \* \* \*." Hence that subdivision applies exclusively to property of which the decedent had beneficial ownership at the time of his death and not to property which at the time of his death simply passes from his control. Cf. *United States v. Field*, 255 U. S. 257. Clearly, therefore, as this Court has already decided in the *Porter* and *Guggenheim* cases, Section 302 (a) of the estate tax and Section

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\* Trust property subject to a power of revocation in the donor is included in the gross estate of the decedent under the provisions of Section 302 (d), and, before the enactment of that section, such trusts were taxable under Section 402 (c) of the Revenue Act of 1921 (c. 136, 42 Stat. 227) as transfers intended to take effect in possession or enjoyment at or after death. See *Reinecke v. Northern Trust Co.*, 278 U. S. 339.

319 of the gift tax are not of the same scope and Section 319 cannot be construed in the light of Section 302 (a).

In arguing otherwise, the petitioner cites *Curry v. McCanless* and *Graves v. Elliott*, both of which cases were decided by this Court on May 29, 1939, Nos. 339 and 372, respectively, October Term, 1938. Neither of those cases involved the construction of a federal statute. Both concerned the constitutionality of state transfer taxes, and it was with reference to the question of constitutional power that this Court stated in the *Curry* case that a general testamentary power of appointment is to be regarded as equivalent to ownership of the property subject to the power, and that in the *Elliott* case it compared a power of revocation to a power of appointment.

We are also in disagreement with the contention of the petitioner in the *Sanford Estate* case that the decision in *Hesslein v. Hoey* is not entitled to much weight because the case was decided on a motion to dismiss the complaint and because the court did not have before it the carefully considered rulings made by the Treasury Department in the *Sanford Estate* case, nor any information concerning the practice of the Bureau of Internal Revenue in dealing with similar cases, nor the legislative history of the Revenue Act of 1924 (Br. 12.)

For reasons already stated, there is ground for believing that *Hesslein v. Hoey* may have been incorrectly decided, but we do not believe the as-



sumption is justified that the court did not give thorough consideration to the question before it. The record was entirely adequate to present the issue and the question of law was fully briefed and argued. It does not appear from the opinion in the case that the legislative history of the tax was disregarded by the court or ignored in the briefs. We fail to see how any significance can be attached to the fact that the court did not have before it the then unpublished rulings in the *Sanford Estate* case, one of which, as a matter of fact, was in accord with the rule adopted in the *Hesslein* case. Cf. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455. Nor do we believe that a fuller knowledge of what the Bureau practice had been would have affected the court's conclusion since the court construed the applicable Treasury regulation as contrary to its decision and expressly disregarded it.

Finally, while we share the solicitude of the petitioner in the *Sanford Estate* case that there be no adverse effect on federal revenues, we cannot agree that a decision that the tax attaches only upon relinquishment of the power of modification would permit "flagrant and widespread income tax avoidance." (Br. 30.) The income tax law was in effect long prior to the enactment of the gift tax. No construction of the gift tax, therefore, could open any avenue to income tax avoidance; at most, it could only fail to close such an avenue. It is reasonable to assume that if Congress thought that a grantor could relieve himself of income tax lia-

bility by creating a trust with a reserved power of modification, and if it had intended to guard against such avoidance, it would have done so directly by taxing the income from such a trust to the grantor,\* rather than indirectly by imposing a gift tax upon creation of the trust.

Nor do we believe that a decision in favor of the Government in the *Sanford Estate* case and against the Government in the *Humphreys* case would have any predictably adverse effect upon federal revenues. Petitioner's argument (Br. 30 *et seq.*) is that, if the tax is imposed upon the creation of a trust subject to a reserved power of modification, it would act as a deterrent upon transfers in trust and thereby increase income tax revenues, whereas a tax imposed only when the power of modification is relinquished would not be such a deterrent. The argument is premised on the assumption that, if threatened by the immediate imposition of a gift tax, the would-be donor would decide not to make the transfer at all and would remain taxable on the income of his property, while the prospect of a gift tax in the future (which he could avoid by not surrendering the reserved power to modify) or the

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\* No useful purpose would be served by entering into a discussion of petitioner's contention, based on *Knapp v. Hoey*, 104 F. (2d) 99 (C. C. A. 2d), that such an income tax would be beyond the power of Congress. Even were this so, it would not throw any light upon the intention of Congress, since there is no indication whatever that Congress believed that it was without the power to levy such a tax and that, for this reason, it enacted the gift tax as a deterrent to the creation of the type of trusts here involved.

imposition of an estate tax upon his death would not have such a result. But there are reasons why it cannot be assumed that this would be the reaction of the would-be donor. He might decide to create a trust in which he reserved no power of modification or revocation and thus avoid both estate and income taxes, the saving in which might well be greater than the amount of the gift tax which he would have to pay. The gift tax rates are considerably lower than the estate tax rates and the saving resulting from the payment of the lower of the two transfer taxes, in conjunction with the saving on income taxes, might well induce the donor to create an irrevocable trust with no power of modification reserved, rather than to make no transfer of the property whatever.

Under these circumstances, we believe that any prediction as to the effect upon federal revenues of a decision either way in the present cases is too hazardous to form the basis of any justifiable inference as to the probable intention of Congress in enacting the gift tax law.

## II

THE ARGUMENTS IN SUPPORT OF THE GOVERNMENT'S POSITION IN THE SANFORD ESTATE CASE THAT A TRANSFER IN TRUST IS NOT A COMPLETED GIFT SO LONG AS THE DONOR RESERVES POWER TO MODIFY THE TRUST DEED AND CHANGE THE BENEFICIARIES

However strong the argument that there is a completed gift *from the donor* when he divests himself of all beneficial interest in the trust property,

it nevertheless cannot be denied that the term "gift," as it is commonly understood, connotes a transfer without consideration from a donor to specific donees. See *Hesslein v. Hoey, supra*. A transfer of property in trust for persons who may any moment be deprived of all benefit from the property is not a real and substantial gift to anyone; the rights of the named beneficiaries are purely formal. There is strong ground for believing, therefore, that Congress intended to impose the tax only when the power of modification is relinquished since only then is there a completed gift to any particular donee or donees.<sup>10</sup>

It is not an answer to this argument to suggest that for this purpose the trustee is the donee. If that were true, the tax could be imposed upon a transfer in trust for the benefit of the donor. *Burnet v. Guggenheim, supra*, indicates that this is not the law. Clearly, therefore, the trustee is not to be regarded as the donee for the purpose of determining when there has been a completed gift.

Nor is it a satisfactory reply to this argument to suggest that if the tax is to await the irrevocable designation of donees, no tax can be imposed where

<sup>10</sup>This Court in *Helvering v. City Bank Co.*, 296 U. S. 85, indicated that it did not consider a transfer in trust subject to a reserved power of modification in the grantor alone to be complete. This is apparent from the fact that it construed the decision in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, as holding that such a transfer in trust may be taxed, upon the grantor's death, as intended to take effect in possession or enjoyment at or after his death.

the trust is not subject to any power of modification but the remaindermen are unascertained persons. In such a case the grantor has fully exercised his power to choose beneficiaries by designating the class of persons who are to take the property, even though the ultimate beneficiaries may not be known until certain events have occurred which are beyond the grantor's power to control. The gift to those ultimate beneficiaries is as complete as the donor can presently make it. In a case like those at bar, on the other hand, the grantor has not fully exercised his power to choose the beneficiaries. As the court suggested in the *Hesslein* case, the day after creating the trust the grantor might have changed it so as to provide that both income and principal should go to a charity instead of to the designated donees.

Moreover, it may plausibly be argued not only that there is not a completed gift to any particular donees but also that there is not a completed gift from the donor. While the donor has, it is true, made a complete transfer of all his property rights in the trust estate, the control which he has retained over the ultimate disposition of the estate is susceptible of such exercise as to afford him considerable indirect economic benefit from the property. It is not unreasonable to assume that the named beneficiaries or prospective donees would be influenced to act in accordance with the donor's wishes in order to prevent or induce, as the case might be, an exercise of the donor's reserved



power. Because of this, the reserved power gives the donor an interest in the trust estate, which, in its effect, is closely akin to a property right. Until this interest is transferred by relinquishment of the reserved power, the transfer of the trust property may logically be deemed an imperfect gift.

*Porter v. Commissioner, supra*, lends support to this view. As previously stated, this Court there held that property transferred by a decedent in trust with a reserved power to change the beneficiaries was properly included in the gross estate of the decedent for purposes of the estate tax. The significance of the decision for present purposes does not lie in the fact that the Court held that the transfer came within the provisions of Section 302 (d) of the Revenue Act but in the fact that it held the statute constitutional as applied to trusts created before there was any provision in the estate tax law subjecting them to the tax. If the transfers by the donor had been deemed complete when made, the statute could not have been applied to them retroactively. *Helvering v. Helmholtz*, 296 U. S. 93. But the Court held that they were incomplete, stating (288 U. S. at 444):

They treat as without significance the power the donor reserved unto himself alone and ground all their arguments upon the fact that deceased, prior to such enactment, completely divested himself of title without power of revocation. It is true that the power reserved was not absolute as in the

transfer considered in *Burnet v. Guggenheim, supra*, in which this court, in the absence of any provision corresponding to subdivision (d), held that the donor's termination of the power amounted to a transfer by gift within the meaning of § 319 of the Revenue Act of 1924, 43 Stat. 313. But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate. \* \* \*

*Burnet v. Guggenheim, supra*, insofar as it indicates that the gift and estate taxes are *in pari materia*, also supports the view that imposition of the tax must await relinquishment of the power of modification. This Court there stated (288 U. S. at 286-287):

The tax upon gifts is closely related both in structure and in purpose to the tax upon those transfers that take effect at death. What is paid upon the one is in certain circumstances a credit to be applied in reduction of what will be due upon the other, 43 Stat. 315, § 322, 26 U. S. C., § 1134. The

gift tax is Part II of Title III of the Revenue Act of 1924; the Estate Tax is Part I of the same title. The two statutes are plainly *in pari materia*. There has been a steady widening of the concept of a transfer for the purpose of taxation under the provisions of Part I. *Tyler v. United States, supra*; *Chase National Bank v. United States, supra*; *Saltonstall v. Saltonstall, supra*; cf. *Bullen v. Wisconsin*, 240 U. S. 625. There is little likelihood that the law-makers meant to narrow the concept, and to revert to a construction that would exalt the form above the substance, in fixing the scope of a transfer for the purposes of Part II. We do not ignore differences in precision of definition between the one part and the other. They cannot obscure identities more fundamental and important. The tax upon estates, as it stood in 1924, was the outcome of a long process of evolution; it had been refined and perfected by decisions and amendments almost without number. The tax on gifts was something new. Even so, the concept of a transfer, so painfully developed in respect of taxes on estates, was not flung aside and scouted in laying this new burden upon transfers during life. Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title. The word had gained a new color, the result, no doubt in part, of repeated changes of the statutes, but a new color none the less. Cf. *Towne v.*

*Eisner*, 245 U. S. 418, 425; *International Stevedoring Co. v. Haverty*, 272 U. S. 50; *Gooch v. Oregon Short Line R. Co.*, 258 U. S. 22, 24; *Hawks v. Hamill*, *ante*, 52, 57.

The foregoing language unquestionably contains an indication that the test of whether the relinquishment of a reserved power is taxable as a gift is whether the termination of such a power upon death is taxable under the estate tax law. If this be so, decision must be in favor of the Government in the *Sanford Estate* case and in favor of the taxpayer in the *Humphreys* case, since the termination by death of a power of modification makes the trust property part of the gross estate for estate tax purposes. *Porter v. Commissioner*, *supra*.

This reasoning, as we have pointed out above, was the principal basis of the decision by the Circuit Court of Appeals for the Second Circuit in *Hesslein v. Hoey*, *supra*. The court there stated (p. 956):

Since the primary purpose of the gift tax statute is to supplement the estate tax statute, it is reasonable to construe the former as excluding gifts so incomplete by reason of powers reserved to the donor, as to be expressly made subject by the latter to the estate tax.

The legislative history of the gift tax confirms the view expressed in the *Guggenheim* and *Hesslein* cases that the gift tax was designed as a complement to the estate tax, although there is no conclusive indication that the gift tax was intended to be construed in the light of the estate tax. The

gift tax provisions of the Revenue Act of 1924 were added by amendments to the revenue bill introduced on the floor of the House and the Senate. See Cong. Rec., Vol. 65, Part 3, pp. 3118-3119; Part 4, pp. 3170-3171; Part 8, p. 8094. The sponsor of the amendment in the House remarked that the gift tax was "a corollary to an estate tax," and, in answer to a question whether the donor or donee would pay the tax, stated that the donor was responsible under the amendment because it was drawn to correspond with the estate tax. Cong. Rec., Vol. 65, Part 3, pp. 3119-3120. He added, however, that the amendment was also needed to protect income tax revenues since the splitting up of large estates reduced the amount of surtaxes as well as defeating the estate tax. Cong. Rec., Vol. 65, Part 3, p. 3120; Part 4, p. 3172. Representative Garner of Texas stated that the principal purpose of the gift tax was to be a "mother tax" to the estate tax. Cong. Rec., Vol. 65, Part 3, p. 3122. The remarks of the sponsor of the amendment in the Senate were similar to those made by the sponsor of the amendment in the House. Cong. Rec., Vol. 65, Part 8, pp. 8095-8096.

When the gift tax provisions of the 1924 Act were repealed in 1926, the Senate Report stated that the tax had been adopted as correlative to the estate tax and that it was being repealed because it involved numerous administrative difficulties, the revenue derived from it was small, and it was easily evaded. S. Rep. No. 52, 69th Cong., 1st Sess.,



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p. 9. It is plausible to assume that its repeal was also linked with the enactment of Section 302 (c) of the Revenue Act of 1926 (U. S. C., Title 26, Sec. 411) which changed the existing estate tax law by creating a conclusive presumption that gifts made within two years prior to the decedent's death were made in contemplation of death. The Revenue Act of 1932 revived the gift tax shortly after the provision for this conclusive presumption was held unconstitutional in *Heiner v. Donnan*, 285 U. S. 312, decided March 21, 1932. See *Hesslein v. Hoey*, *supra*.

The reports of the House and Senate committees on the 1932 Act, like the statements made on the floor of Congress during the debates on the 1924 Act, demonstrate an intention to correlate the two transfer taxes. The report of the House Ways and Means Committee was, in part, as follows (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 8, 28-29):

To assist in the collection of the income and estate taxes, and prevent their avoidance through the splitting up of estates during the lifetime of a taxpayer, your committee recommends a gift tax with a maximum rate of 30 per cent. The increased estate tax and the gift tax together will produce additional revenue for the fiscal year 1933 of only \$35,000,000.

\* \* \* \* \*

In short, the design is to impose a tax which measurably approaches the estate tax which would have been payable on the donor's

death had the gifts not been made and the property given had constituted his estate at his death. The tax will reach gifts not reached, for one reason or another, by the estate tax.

The gift tax will supplement both the estate tax and the income tax. It will tend to reduce the incentive to make gifts in order that distribution of future income from the donated property may be to a number of persons with the result that the taxes imposed by the higher brackets of the income tax law are avoided. It will also tend to discourage transfers for the purpose of avoiding the estate tax.

\* \* \* Since the gift tax is an adjunct of the estate tax which is not restricted to transfers made within a single year, an effective gift tax must give consideration, so far as the rate of tax is concerned, to transfers made in prior years.

\* \* \* \* \*

The report of the Senate Finance Committee contains substantially the same statements (S. Rep. No. 665, 72d Cong., 1st Sess., pp. 11, 40), and the same views were also expressed during the debates on the bill in Congress (Cong. Rec., Vol. 75, Part 5, pp. 5688-5691).

• If, as this legislative history indicates, the gift tax was designed as a complement to the estate tax, it would seem proper to interpret the gift tax as intended to impose liability only upon relinquishment of the grantor's power of modification.

If the gift tax is imposed at a time when the grantor still retains a power of modification, and if he fails to exercise it, an estate tax will also be imposed. While this creates no problem of double taxation because the gift tax is allowed as a credit against the estate tax (*supra*, p. 30), it clearly fails to correlate the two transfer taxes.

It is true, as pointed out in the first portion of this brief, that Section 302 (d) of the estate tax contains a specific provision for taxation of the termination by death of a reserved power of modification, while the gift tax contains no similar provision. But in the *Guggenheim* case, this Court rejected the contention that the concept of a transfer under the gift tax law differs from that under the estate tax law simply because the former fails to specify as taxable gifts transfers expressly subjected to the estate tax under Section 302 (d). While the difference in the precision of definition between the two laws may not be ignored, no canon of statutory construction compels the conclusion that the two laws are different in scope because different in the particularity with which the objects of taxation are specified.

The correlation argument is bolstered by consideration of Section 510 of the gift tax law which imposes a secondary liability upon the donees for payment of the tax. If imposition of the tax at the creation of the trust means that the named beneficiaries are secondarily liable for the tax under Section 510 even though they may subse-

quently be deprived of all interest in the property, an incongruous situation would be created. Although, as we have pointed out in the first section of this brief, this construction of Section 510 is by no means free from doubt, it was the construction adopted by the Circuit Court of Appeals for the Second Circuit in the *Hesslein* case. Moreover, as the court pointed out in the *Hesslein* case, if a gift tax is imposed on a transfer in trust before the donor has irrevocably chosen the beneficiaries, it would result in imposing a tax upon a charitable gift if the donor should ultimately decide to change the named beneficiaries and substitute a charity. Congress clearly did not intend gifts to charity to be so reduced since it expressly exempted them from the gift tax. Section 505 (a) of the Revenue Act of 1932, U. S. C., Title 26, Section 554.

In deciding the *Hesslein* case, the court disregarded the Treasury Regulations, which it construed as being opposed to its decision, on the ground that they were of recent adoption and did not have the sanction which would result from a subsequent reenactment of the statute. We have pointed out in the first portion of this brief that there are considerations which indicate that the court may have erred in this respect. On the other hand, it is unquestionably true that the earlier regulations, which are the ones applicable to the cases at bar, cover the present situation, if at all, only by implication. They are addressed specifically to the exercise of a power of revocation and



may well not have been intended to include the case of a reservation of a power of modification. As we have pointed out above, the Circuit Court of Appeals for the Third Circuit, in its opinion in the *Sanford Estate* case, expressed the view that the regulations were inconclusive.

#### CONCLUSION

We believe that almost equally cogent arguments may be advanced in support of the position which the Government has taken in each of the cases at bar and we do not feel that a decision either way will have any predictable effect upon the aggregate amount of federal revenues.

Respectfully submitted.

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SAMUEL O. CLARK, Jr.,  
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RICHARD H. DEMUTH,  
*Special Attorney.*

SEPTEMBER 1939.

## APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly:

\* \* \* \* \*

SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph

(2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange.

SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, insofar as applicable, to the same provisions of law as the tax imposed by section 301.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to re-vest in the donor title to such property is vested in the donor, either alone or in con-

junction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift. [U. S. C., Title 26, Sec. 550.]

#### SEC. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. [U. S. C., Title 26, Sec. 555.]

#### SEC. 509. PAYMENT OF TAX.

(a) *Time of Payment.*—The tax imposed by this title shall be paid by the donor on or before the 15th day of March following the close of the calendar year.

\* \* \* \*

[U. S. C., Title 26, Sec. 558.]

#### SEC. 510. LIEN FOR TAX.

The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift sold by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien herein imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after-acquired property)

except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth. If the Commissioner is satisfied that the tax liability has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all of the property from the lien herein imposed. [U. S. C., Title 26, Sec. 559.]

Revenue Act of 1934, c. 277, 48 Stat. 680:

**SEC. 511. GIFTS OF PROPERTY SUBJECT TO POWER.**

Subsection (c) of section 501 of the Revenue Act of 1932 (relating to the inapplicability of gift tax in the case of the transfer of property in trust subject to the power of the donor to revest title in himself) is repealed. [U. S. C., Title 26, Sec. 550.]

Treasury Regulations. 67 (1924 ed.), promulgated under the Revenue Act of 1924:

**ARTICLE 1. *Transfers reached.***—At common law the term "gift" is applied only to voluntary transfers of property made without consideration or compensation therefor. But the taxing act with which these regulations deal employs the term "gift" in a wider and more comprehensive sense, for, while it embraces transactions which at common law amount to gifts, it goes further by including sales and exchanges for less than a fair consideration in money or money's worth. (See sec. 320.) Hence, the statute reaches and taxes all transfers of property made during the calendar year (other than the gifts specified in par. (3) of subdivision (a) and in par. (2) of subdivision (b) of sec. 321), to the extent that they are dona-



tive in character and exceed the authorized deductions.

The subject of the gift may consist of any species of property or interest therein, whether legal or equitable. Thus, for example, a taxable transfer may be effected by a transfer of real estate, by the declaration of a trust, by the forgiveness of an indebtedness, the payment of another's debt, the assignment of a judgment, or the transfer of cash, certificates of deposit, or of Federal, State, or municipal bonds. A sale or exchange for a consideration reducible to a money value which is less than a fair consideration amounts to a gift, within the meaning of the statute, to the extent that the fair market value of the property, at the time of the transfer, exceeds the consideration received. If the consideration is not reducible to a money value it is to be wholly disregarded. A transfer which is neither a sale nor an exchange does not involve a gift if there is a valid, even if not an adequate, consideration for the transfer.

The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated.

The statute embraces donative transfers made by corporations, associations, partnerships, trusts, and estates, as well as those made by individuals. (See art. 25.)

Treasury Regulations 79 (1933 ed.), promulgated under the Revenue Act of 1932:

**ART. 3. *Transfers in trust.***—Where property is transferred in trust without an adequate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, but, where the donor reserves such power, the transfer does not constitute a gift within the meaning of the statute. The relinquishment or termination, without an adequate and full consideration in money or money's worth, of the power to revest in the donor title to property transferred in trust, is a gift of such property at the time of the relinquishment or termination of the power, except where the power is terminated by the donor's death. The payment of income to a beneficiary of a trust, other than the donor, is a gift of such income where the donor has the power to revest in himself title to the trust property. For the purposes of these regulations a donor shall be considered as having the power to revest in himself title to the property transferred in trust where he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the trust property or the income therefrom. A trustee, as such, is not a person having a substantial adverse interest in the disposition of the trust property or the income therefrom. Where the power to revest in the donor title to property transferred in trust reposes in him in conjunction with any other person having a substantial adverse interest in the disposition of the property or the income therefrom or where the power is in such other person alone, the transfer is subject to tax as though no such power existed.

Treasury Regulations 79 (1936 ed.), promulgated under the Revenue Act of 1932 as amended by the Revenue Acts of 1934 and 1935:

**ART. 3. *Cessation of donor's dominion and control.***—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal and beneficial title, is still in essence merely formal so long there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. A donor shall be considered as having the power to revest in himself the beneficial title to the property transferred if he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the property or the income therefrom. A trustee, as such, is not a person having a substantial adverse interest in the disposition of the trust property or the income therefrom. The relinquishment or termination of the power, occurring otherwise than by the death

of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply.<sup>1</sup> The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the formal transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the donor's power to receive it himself, and constitutes a gift of such income or of such other enjoyment taxable in the calendar year of its receipt.

If the donor contends that a power retained by him constitutes beneficial dominion and control, and that by reason thereof the transfer is not in substance a gift, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument by which the transfer was made, should be submitted.

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<sup>1</sup> So held in *Burnet v. Guggenheim* (288 U. S. 280, 53 S. Ct. 369) of a transfer in trust, made in 1917, with power in the donor to revoke, which power he relinquished in 1925, the relinquishment being treated a gift subject to the tax imposed by the gift tax title of the Revenue Act of 1924.







Office - Supreme Court, U. S.

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CHARLES ELMORE CROFLEY  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1939.

No. 34

ESTATE OF CHARLES HENRY SANFORD, Deceased, Jennie  
R. Baird, Substitutionary Administratrix, c. t. a.,  
*Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE.

No. 37

ALMON G. RASQUIN, Collector of Internal Revenue of the United  
States for the First District of New York,  
*Petitioner,*

*v.*

GEORGE ARENTS HUMPHREYS.

**MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS  
CURIAE AND BRIEF.**

BEVERLEY R. ROBINSON,  
E. N. PERKINS,  
WESTON VERNON, JR.,

15 Broad Street,  
New York, N. Y.



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---

**MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS  
CURIAE AND BRIEF.**

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**Motion.** —

Now come the undersigned, of 15 Broad Street, New  
York City, members of the Bar of this Court, and move for  
leave to file the annexed brief as *amicus curiae*, the consent  
of counsel for the petitioner and that of counsel for the

respondent in each case having been first obtained. The undersigned asks this leave as counsel for a taxpayer whose rights respecting a state of facts now existing will be affected by the final determination which shall be made in this cause, for which reason such taxpayer has a substantial interest in the result.

BEVERLEY R. ROBINSON,  
E. N. PERKINS,  
WESTON VERNON, JR.,  
15 Broad Street,  
New York, N. Y.

IN THE  
**Supreme Court of the United States,**  
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**BRIEF OF AMICUS CURIAE.**

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**Statement.**

The facts are fully presented in the briefs now on file. Generalized, the question for decision is whether a voluntary *inter vivos* transfer of property in trust is taxable as transfer by gift under the applicable Revenue Act, where the donor retains power to change the beneficiaries but may not revest the property in himself or whether the tax is imposed later when the reserved power is relinquished.

In the *Sanford* case (No. 34) the petitioner's testator in 1913 created certain trusts, reserving in each the right to terminate or modify, termination to result in revesting the property in the settlor. By deed made in November, 1919, the power of revocation was relinquished, while the power to modify in other respects was retained. By deed made in August, 1924, the retained power to modify otherwise than by revocation, was relinquished. There was no gift tax law in effect at the time of the relinquishment of the power to revoke, but the gift tax of the Revenue Act of 1924 was in effect at the time the power to modify was relinquished. Since the relinquishment in 1924 of the power to modify was not regarded as subject to tax, no gift tax was paid.

The Commissioner claimed that the surrender in 1924 of the power to modify completed a transfer by gift and therefore was taxable. If the transfer by gift was complete in November, 1919, when the power to revoke was relinquished, at which time no gift tax was in force, the claim of the Commissioner in the *Sanford* case is untenable.

In the *Humphreys* case (No. 37) the respondent in 1934 transferred property to trustees reserving the income to himself for life and upon his death the corpus or income was to be disposed of in certain specified ways, depending upon which of the named remaindermen survived the donor. The trust was declared to be irrevocable and provided that it was not to be modified except that the settlor reserved the right to alter and amend the trust to the extent of substituting for the named beneficiaries other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries should take. The trust also provided that the settlor should not by any alteration increase his beneficial interest in the trust estate.

The respondent reported the value of the remainder of the interests as taxable gifts but later claimed a refund on the ground that the transfer did not constitute a taxable gift, in view of the reserved power to change beneficiaries.

## Argument.

### POINT I.

**A completed transfer by gift occurs when property is donated to a trust and the settlor retains no power to re-take the property.**

When property passes irrevocably, there is a complete transfer and there the tax is incurred because the gift tax is imposed on "the transfer \* \* \* of property by gift" (Revenue Act of 1932, § 501; and *Cf.* Revenue Act of 1924, § 319). The transfer is complete because both the property and the use and enjoyment have passed wholly from the settlor and nothing remains in him. The reservation of a power in the settlor to change the beneficiaries, does not detract from the completeness of the transfer since the property and its use and enjoyment are forever out of the settlor. Upon a change of beneficiaries nothing passes from the settlor, for he has nothing which can be the subject of transfer.

Inasmuch as the interest of the beneficiary may be divested through exercise of the reserved power, we of course do not contend that the *benefaction* is beyond change. The gift tax, however, is an excise tax upon the *transfer* of property by gift and it is not necessary that the use and benefit of the property be beyond change if the transfer from the settlor is complete.

Until the issue presented in these cases was passed upon in *Hesslein vs. Hoey*, 91 F. (2d) 954 (C. C. A., 2d), certiorari denied 302 U. S. 756, only one donative transfer in trust was relieved from the gift tax, namely, where the grantor retained the power to revoke and thus to revest in himself title to, and enjoyment of, the corpus of the trust. This lone exception was early made by the Commissioner's Regulations. (Reg. 67, 1924 Ed., Art. 1), was recognized by Congress (Revenue Act of 1932, § 501(c)), and by this



Court in *Burnet vs. Guggenheim*, 288 U. S. 280. The basis for this exception is that a gift subject to the power to revoke is no gift at all but is one "that may never become consummate in any real or beneficial sense". *Burnet vs. Guggenheim*, *supra*, page 288.

The consistent administrative practice has been to apply the gift tax to a transfer in trust where the grantor retains the right to change the beneficiaries. (See the Government's brief, page 27). The Commissioner's Regulations have dealt only with the case in which the grantor has the power to *revoke* and have provided that the gift tax is applicable in such case when the power to revoke is terminated. (Reg. 67, 1924 ed., Art. 1; Reg. 79, 1933 ed., Art. 3; Reg. 79, 1936 ed., Art. 3). None of the Regulations have dealt with the power to change beneficiaries or indeed with the reservation of any other type of power except one to revoke. The positive nature of the administrative provisions dealing with reserved powers of revocation, when considered in the light of consistent administrative practice, makes the omission of any reference to powers of modification significant. We submit that the Treasury Regulations must be read as reflecting an administrative interpretation that only a power of revocation could withdraw a transfer from the operation of the tax. And this view is strengthened by the late Regulations, which specifically state that the tax is not imposed upon the receipt of property by the donee, nor is it measured or conditioned by the enrichment of the donee or by the fact that the donee cannot be identified at the time of the transfer.

These cases differ from *Burnet vs. Guggenheim*, *supra*. There the transfer was held incomplete until relinquishment of the unconditional power to revoke because the transfer was illusory as a reality so long as the settlor could take the property back. He had no more deprived himself of his property by the transfer than the depositor in a bank deprives himself of his money.

The court below decided this case as it did, and contrary to its better judgment (see 103 Fed. (2d) p. 83) because of *Hesslein vs. Hoey, supra*, where the court held there had been no completion of transfer because the right to change beneficiaries had been reserved. The reasoning in the *Hesslein* case is shot through with fallacy. The court thus applied a case where plainly the transfer was incomplete (*Burnet vs. Guggenheim*), to a case where plainly the transfer was complete. *Porter vs. Commissioner* (288 U. S. 436) also was misunderstood and misapplied in the *Hesslein* case, due to overlooking the fact that the decision in the *Porter* case did not turn on the completeness or incompleteness of a transfer, but on the aptness of the language of section 302 (d) to include the transferred property in the gross estate and the power of Congress under the Constitution to direct that particular inclusion.

In the *Hesslein* case, *supra* at p. 955, the court said:

“ \* \* \* This restriction [not to benefit self in changing disposition of the property through a reserved power] prevents the power reserved from being as absolute as that considered in *Burnet v. Guggenheim, supra*, but the power is nevertheless broad enough to enable the donor, subject only to the exception stated, to make a complete revision of all he has done. \* \* \* ”

The court likens the case to the *Guggenheim* case, overlooking the fact that in the *Hesslein* case the property had passed irrevocably to the trustee and the beneficiary, and the transfer (the thing taxed) was complete, and only the beneficiaries' interests (which are not what is taxed) remained incomplete in the sense that they could be changed. In the *Guggenheim* case, however, the transfer was plainly incomplete in that it was completely revocable. This fallacy stands out strikingly in the next paragraph of the court's opinion in the *Hesslein* case:

“ \* \* \* When the donor reserves the power to change the beneficiaries at will, whether the reserva-

tion be phrased\* as a power to revoke or as a power to alter in any manner not beneficial to the donor or his estate, nothing has been done to give assurance that any part of the principal will ever be received by the named donees. . . ."

Thus, the court in the *Hesslein* case stresses as a ground of decision, the immaterial fact that since the beneficiaries can be changed, the benefaction remains imperfect, and ignores the decisive fact that the transfer, upon which the tax is levied, is perfect, since the property has passed from the donor irrevocably.

Further support for the view that Congress intended to impose the gift tax upon the completion of the transfer from the donor rather than upon the final determination of the donee is found in the statutory provision making the donor primarily liable for the tax (Revenue Act of 1924, Section 324; Revenue Act of 1932, Section 509(a)). Thus, the statute itself has chosen as the taxable event the transfer of property by the donor without regard to whether the donee's interest has vested beyond change.

## POINT II.

The construction put on the statute by the Court below in the *Seyford* case defeats the intention of Congress.

The committee reports on the Revenue Bill of 1932 stated that the gift tax "will supplement both the estate tax and the income tax".\*\* Prior to the imposition of a gift tax, tax-free transfers of property could be made with the result that the income therefrom was divided among

\* The difference between the power of one who can revoke and the power of one who, though able to alter otherwise, can not revoke, certainly is not one of phraseology. Such logical *leger-de-main* is not surprising where unlike things are treated as being alike.

\*\* House Report No. 708, 72nd Congress, First Session, page 28; Senate Report No. 665, 72nd Congress, First Session, page 40.

a number of persons and taxes imposed by the higher brackets of the income tax were avoided. Obviously, the gift tax was intended to be imposed at the point where there is a shifting of taxable income from donor to donee and the law should be so construed. The construction put on the gift tax by the court below in the *Sanford* case, however, would permit a taxpayer to shift the enjoyment of the income to others, who would be subject to the income tax, and yet, if the donor retains the power to change the beneficiaries, avoid the gift tax.

The force of this consideration might be impaired if the gift tax would be a more effective supplement to the estate tax under the ruling of the *Sanford* case below than otherwise. Ever since the Revenue Act of 1924 the estate tax has reached all property transferred in trust by a decedent prior to death if the settlor retained the power to change the beneficiaries. (See Section 302(d), Revenue Act of 1924, as amended.) Thus, the estate tax is not strengthened by a decision that the gift tax does not apply where there is a transfer in trust subject to the power of change of beneficiaries.

Moreover, it is clear from the legislative history of the gift tax that Congress meant to exempt only those transfers where the power to *revoke* is retained and intended to tax all other transfers in trust. In Section 501(c) of the 1932 Act, it was expressly provided that the gift tax should not apply to any transfer where the donor retained, alone or jointly with another, power to revest title but that a tax should be incurred in such a case on the relinquishment of such a power. By expressly exempting from the tax only transfers subject to a power of revocation, Congress made it plain that transfers subject to other powers, such as the power to change beneficiaries, should be taxed.

After the 1932 Act was approved, this court decided *Burnet vs. Guggenheim*, *supra*, holding, under the 1924 Act, which contained no provision similar to Section 501(c), that a voluntary transfer in trust subject to a power of revoca-

tion is not a completed gift and the gift tax applies only when there is a relinquishment of the power of revocation. Thus, *Burnet vs. Guggenheim* showed that Section 501(c) of the 1932 Act was unnecessary in order to lay a tax on the relinquishment of a retained power of revocation.

When the Revenue Act of 1934 was under consideration Section 501(c) of the 1932 Act was repealed, not in order to change the law, but because the section was deemed unnecessary. The Congressional reports make this perfectly clear, saying (House Report No. 704, 73rd Congress, Second Session, page 40; Senate Report No. 558, 73rd Congress, Second Session, page 50):

“ \* \* \* the principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court decision in the *Guggenheim* case.”

Judge Hand, in his dissent in the *Hesslein* case, recognized this, for he stated:

“Consequently as a matter of Congressional interpretation subdivision (b) [laying the tax] is to be read as if subdivision (c) [expressly excepting transfers subject to power of revocation] was still a part of the act. \* \* \*”

It seems clear, therefore, that Congress intended to exempt from the gift tax only those transfers in trust where the settlor retains the power to revoke and plainly indicated an intention to tax all other transfers in trust.

Consequently, we submit that the decision of the court below in the *Sanford* case should be reversed and that the decision in the *Humphreys* case should be ~~affirmed~~ *reversed*.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

**October Term, 1939.**

**No. 34.**

ESTATE OF CHARLES HENRY SANFORD, Deceased,  
Jennie R. Baird, Substitutionary Administratrix,  
c. t. a.,

*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.

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**PETITION FOR REHEARING.**

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JOHN W. DAVIS,  
MONTGOMERY B. ANGELL,  
OTIS T. BRADLEY,  
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MARVIN LYONS,  
Attorneys for the Petitioner.



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**Supreme Court of the United States**

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ESTATE OF CHARLES HENRY SANFORD,  
Deceased, Jennie R. Baird, Substi-  
tutionary Administratrix, c. t. a.,  
*Petitioner,*

**No. 34.**

**v.**

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

**PETITION FOR REHEARING.**

The petitioner herein respectfully makes application for a rehearing and reconsideration of this case. The opinion of the Court was promulgated and the judgment was entered on November 6, 1939.

The issue in this case as drawn by the Court in its opinion is whether, in the case of a gift in trust subject to reserved powers, the gift is complete for the purposes of the gift tax when the grantor terminates the right to retake or recall the corpus and income for himself (which may occur either on the creation of the trust or, following the creation, on the surrender of a reserved power to recall), or, later, when the grantor surrenders the remaining right to modify in favor of others.

In support of this petition for rehearing, the petitioner respectfully shows:



## I.

In reaching its decision, it is respectfully suggested that the Court failed to interpret the gift tax provisions as part of "a unified scheme of taxation", although evidently intending to accomplish this aim.

We are here engaged in applying a statute taxing generally "the transfer \* \* \* by gift" to a limited class of gifts, namely, gifts in trust subject to reserved powers. On page 2 of the opinion it is said that in ascertaining the exact construction of the statutes taxing gifts "it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death", and again on page 6, that the question "must be decided in conformity to the course of judicial decision applicable to a unified scheme of taxation of gifts whether made *inter vivos* or at death". Such an approach falls short of the need of "a unified scheme of taxation", for while relating the gift tax and the estate tax, it wholly fails to relate either or both to the income tax provisions, provisions which are as much a part of our "scheme of taxation" as are the gift tax or the estate tax.

This Court has said time and again that it is "a long established rule" that "the intention of the law-maker is to be deduced from a view of every material part of the statute". *Hellmich v. Hellman*, 276 U. S. 233, 237. In *Helvering v. New York Trust Co.*, 292 U. S. 455, Mr. Justice Butler expressed the rule thus (p. 464):

"Speaking through Chief Justice Taney in *Brown v. Duchesne*, 19 How. 183, this court said (p. 194):

"It is well settled that, in interpreting a

statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' "

In *Helvering v. Morgan's Inc.*, 293 U. S. 121, 126, Mr. Justice Stone, citing *Helvering v. New York Trust Co.*, *supra*, said:

"But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part."

In applying one section of our revenue acts to a special set of facts, surely it is essential to consider with care any other provision which is material to or may bear upon the problem. Such a rule recognizes no formal division of our revenue laws into one Title or another, or into one Part or another. It is as important to "relate" a provision in Title II with a provision in Title III as it is to relate Part I and Part II of Title III. Otherwise, an interpretation may be given to one part which, when the revenue statutes are considered as a whole, may well defeat the legislative intention.

The Court in its opinion has treated the gift tax provisions and the estate tax provisions in effect as a single tax covering transfers, whether the transfer is made *inter vivos* or by will or intestacy on death. As

we pointed out on page 55 of our main brief, we earnestly contend that, while both are excise taxes, under our present scheme of taxation the two forms of taxes are of a very different character, a contention which is borne out by Mr. Justice Stone's statement in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347, when, in speaking of the estate tax, he said:

"In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death \* \* \*. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924 \* \* \* has been repealed \* \* \*."

But even though the two taxes are considered as one transfer tax on gifts, there is still the need of studying with care the effect of Section 219 (g), since it in terms covers the very class of gifts in trust here involved. Unless the income tax rules are borne clearly in mind, there is grave danger of "harmonizing" two parts of the statute at the expense of complete disharmony with another part, and the effort to avoid "the perpetuation of inconsistency and confusion" may in reality achieve greater confusion worse confounded.

The income tax provisions in Title II are a part of our revenue statutes equally as important as are the gift and estate tax provisions in Title III. The income tax rule exemplified in Section 219 (g) is of the highest materiality in determining the intention of Congress as to how the gift tax should be applied in the case of a special class of gifts, if not indeed controlling. We are here considering the application of the gift tax in the case of a gift in trust subject to a reserved power, the very situation which Congress covered in no uncertain terms in Section 219 (g) for income tax purposes. If our revenue statutes are to

have healthy growth and cohesion, real harmony cannot be accomplished unless the statute is scanned broadly as a whole.

This Court said in the course of its opinion (p. 3) that "There is nothing in the language of the statute and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given". This, it is respectfully suggested, is a misconception. In drafting the very Revenue Act which we are here considering, Congress added Section 219 (g), which does suggest that in the case of gifts in trust, Congress may very probably have intended to impose the gift tax "before the donor had fully parted with his interest in the property given". If this were not the case, one of the declared purposes of Congress in enacting the Gift Tax Act would be defeated, as indicated by the Congressional debates to which reference is made on page 37 *et seq.* of our main brief.

Section 219 (g) of the 1924 Act, since retained without material change in our subsequent Acts and now appearing as Section 166 of the Internal Revenue Code, imposes the income tax upon the donor of a gift in trust so long as he retains "the power to re-vest in himself title to any part of the corpus of the trust". This exact phrase appears in Section 501 (c) of the 1932 Gift Tax Act and was adopted by the Commissioner in his 1924 and 1932 Gift Tax Regulations. The very similarity of language used in Section 219 (g), in Section 501 (c) and in the Commissioner's Gift Tax Regulations surely indicates that in applying the gift tax to cases of gifts in trust subject to reserved powers, the income tax rule applicable in the case of such trusts is of real materiality in the interpretation of the Gift Tax Act. As this Court has said, where the identical phrase ap-

appears in different parts of the same Act, it is to be presumed that the legislature has used the phrase with the same meaning, unless the context indicates that a different meaning was intended to be ascribed to it. *Helfering v. Stockholms etc. Bank*, 293 U. S. 84, 87 (1934).

Let us examine the actual language in these different parts of the statute and regulations. Section 219 (g) of the 1924 Act [and Section 166 of the 1932 Act] provides:

"Where the grantor of a trust has \* \* \* *the power to revest in himself title to any part of the corpus of the trust*, then the income \* \* \* shall be included in computing the net income of the grantor." (Italics ours.)

Section 501 (c) of the 1932 Act provides:

"The tax shall not apply to a transfer of property in trust where *the power to revest in the donor title to such property* is vested in the donor, \* \* \* but the relinquishment or termination of such power \* \* \* shall be considered to be a transfer by the donor by gift \* \* \*." (Italics ours.)

The 1924 Gift Tax Regulations (adopted without any change of present significance in the 1932 Regulations as the Court itself said on page 7) provide:

"The creation of a trust, where the grantor retains *the power to revest in himself title to the corpus of the trust*, does not constitute a gift \* \* \* [but] a taxable transfer will be treated as taking place in the year in which such power is terminated." (Italics ours.)

In drafting the 1924 and 1932 gift tax Regulations, the Commissioner of Internal Revenue was acutely



aware of the relevancy of the income tax provision as it bore on the intention of Congress in imposing a gift tax on gifts in trust, for such gift tax regulations specifically cover the treatment of "the annual income of the trust", and provide that such trust income shall be taxable as a gift by the grantor so long as he retains "the power to revest in himself title to the corpus". As in the case of a primary transfer in trust, the implication is equally clear that *when* a taxable transfer of the corpus occurs, the income of the trust is taxable income to the beneficiaries and its payment over does not subject the transferor to a gift tax. This has been the consistent practice of the Commissioner in adjusting cases involving such income.

The presence of the identical phrase, first, in Section 219 (g) of the 1924 Act, then in the Commissioner's 1924 gift tax Regulations, and again in Section 166 [the counterpart of Section 219 (g)] and in Section 501 (c) of the 1932 Act, shows the care with which Congress and the Commissioner related the gift tax provisions to the income tax provisions in gifts of this character. The significance of this interrelation is emphasized by the retention of the same language in Section 166 of the subsequent income tax Titles.

In view of the origin and history of the phrase under consideration in the two parts of the same statute, it is respectfully suggested that the Court in reaching its decision failed to give sufficient attention to the presence and effect of Section 219 (g) as it bears on the interpretation of the tax on gifts in trust subject to reserved powers.

The meaning of the phrase "the power to revest in himself title to any part of the corpus of the trust" as used in Section 219 (g), is, we submit, without

any possible ambiguity in meaning, particularly when read in the light of the Commissioner's regulations construing this section, not only under the 1924 Act but under all subsequent Acts. Article 347 of Regulations 65 under the 1924 Act provides that so long as the grantor retains "the power to revest in himself title to any part of the corpus of the trust", the income of such part is taxable to him, and then continues—

"Where the grantor relinquishes during the taxable year his power to revest in himself title to the corpus of the trust, the income of the trust shall be taxable to the grantor only for the period during which he had such power."

The same language appears in Article 347 of Regulations 69 under the 1926 Act, in Article 881 of Regulations 74 under the 1928 Act, and in Article 881 of Regulations 77 under the 1932 Act. In Article 166-1 of Regulations 86 under the 1934 Act, as originally promulgated, the language was somewhat modified, but the same test was continued. Article 166-1 provides:

"(b) *Test of taxability to the grantor.*—The sufficiency of the grantor's retained interest in the corpus resulting in the taxation of its income to the grantor is determined by a single test, namely, whether the grantor has failed to divest himself, permanently and definitively, of every right which might by any possibility enable him once more to possess and enjoy in title the trust corpus."

Conversely, the article provides—

"If the grantor strips himself permanently and definitively of every such interest in the corpus retained by him, the income of the trust realized

after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161 and 162."

Regulations 86 were subsequently amended to bring them into conformity with Article 166-1 of Regulations 94 under the 1936 Act, which provided—

"For the purposes of this article the grantor is deemed to have retained such power if he \* \* \* may cause the title to the corpus to revest in the grantor."

and again—

"On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of Sections 161, 162, and 163 are applicable."

Article 161-1 of Regulations 101 under the 1938 Act, the last complete regulations which the Commissioner has issued, prescribes the same rule.

The income tax rule of section 219 (g) and the Commissioner's income tax Regulations were considered and sustained by this Court in *Corliss v. Bowers*, 281 U. S. 376 (1930). In that case this Court had no difficulty with the meaning of the phrase. It held that so long as the grantor retained the power to revest the title in himself, he was liable for the tax on the income of the trust, since it was subject to his "unfettered command", even though the beneficiaries in fact received and enjoyed the income. Similarly, the converse of the rule has been sustained by the Circuit Court of Appeals for the Second Circuit in the *Knapp* case and in other cases cited on page 30 of

our main brief. Again the Court and the Board had no difficulty with the meaning of the phrase. On the relinquishment, said the Circuit Court in the *Knapp* case, of "the power to re-vest in himself title to any part of the corpus", a transfer of the corpus occurred, which shifted the liability for the income tax on the income from the grantor to the trust estate, even though the grantor retained a power to change the beneficiaries and redesignate the use and enjoyment of the income by others. —

## II.

It is respectfully suggested that in applying the earlier regulations and Section 501 (c) of the 1932 Act, the Court may have misconceived, as a matter of substantive law, the true character of the power which Sanford surrendered in 1919, and may have been misled by the fact that the taxable transfer in the *Sanford* case, as we conceive it, occurred prior to the enactment of the gift tax act.

On the surrender in 1919, Sanford lost the right "to withdraw principal or income from any trust". This can mean only one thing. At that point he relinquished any right to *retake for himself* principal or income. After 1919 he continued to exercise a degree of control over the use of the principal and income *for others*, but this control stopped short of any further control over it *for himself*.

Now if a settlor relinquishes the right to retake for himself the corpus or income, it follows that he has relinquished the power to *re-vest in himself* any *beneficial* title to or interest in the corpus of the trust, and, conversely, when he relinquishes the power to re-vest in himself any beneficial interest in the corpus, he

has lost the power to retake for himself the principal or income. The two phrases are identical in meaning. So long as a settlor may revest in himself the trust corpus, he may destroy the trust and retake the corpus (and hence the income) for his own uses, free and clear of any interest on the part of the beneficiaries. But, after he surrenders such a right, he no longer may enjoy *for his own uses* the *beneficial* interest in the corpus or income, even though he may control its use by others. On such a surrender there is a final shift from the settlor to others of any and all *beneficial enjoyment* of the corpus, either directly, indirectly, or through any subterfuge. For example, as a matter of substantive law, it is entirely clear that after the surrender of the power in 1919 Sanford could not designate his estate as the recipient of the corpus or income, nor could he appoint to a creditor in partial or complete cancellation of his indebtedness, nor could he appoint to anyone for a consideration. See *Matter of Carroll*, 274 N. Y. 288 (1937). If he should attempt to do so, the existing beneficiaries named in the trust would have an appropriate remedy to prevent any act in derogation of the power, since the power was a non-beneficial power in trust. However the power surrendered in 1919 may be designated, or however the power retained may be described, Sanford in 1919, as a matter of substantive law, relinquished forever and without right of recall any and all power or right to revest in himself any *beneficial* interest in the corpus and income.

Bearing in mind the true character of the power which Sanford surrendered in 1919, it is hard to see how any difficulty arises in applying the language of the Commissioner's regulations or the language Congress used in Section 501 (c) of the 1932 Act.



The regulations and the 1932 statute in terms provide that the taxable transfer occurs on the relinquishment of "the power to revest [in the grantor] title to the corpus". The word "title" necessarily means beneficial title to or interest in the corpus. This obviously is the meaning ascribed to the word "title" as used in the identical phrase in Section 219 (g). To impute to the word "title" as used, in either place a meaning which excludes the conception of beneficial interest renders the phrase wholly senseless. During the course of this long litigation, at no point has it ever been suggested that the phrase in question had any other implication than that of imposing the tax at the point where the grantor relinquishes all beneficial title to or interest in the corpus for his own use.

The pattern of the Commissioner's earlier regulations and of Section 501 (c) of the 1932 Act must be applied, we respectfully submit, regardless of whether the shift or transfer in interest susceptible of sustaining the gift tax occurred prior to or during a gift tax period. The several parties and the Court itself agree that the *Hesslein* case, the *Humphreys* case, and the *Sanford* case are all controlled by the same considerations. This being the case, it is of no consequence whether the taxable transfer occurred on the creation of the trusts, as in the *Hesslein* and *Humphreys* cases, or whether, following the creation of the trusts, on the surrender by the grantor of the power to enjoy for himself the beneficial interest in the corpus; nor is it material whether the taxable transfer occurred before or during a gift tax period. In interpreting and applying the earlier regulations and Section 501 (c) of the 1932 Act, clear thinking requires that it be assumed the earlier regulations and

the statute were in effect at the time of, and at all material points following, the creation of the trust, for otherwise it cannot be said that the three cases present the same question, and, of course, a very serious miscarriage of justice would thereby occur.

### III.

The Court in its opinion says (p. 7) that the Commissioner's 1936 Regulations "removed the ambiguity by declaring that the gift is complete and subject to the tax when 'the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself' ". It is respectfully suggested that the rule of the 1936 Regulations does not differ in any respect from the rule of the 1924 Regulations.

As we have said, the word "title" in the 1924 Regulations necessarily contemplates the beneficial title. This being so, the material language in the 1936 regulations and the language in the earlier regulations mean precisely the same thing. Certainly the 1936 Regulation added nothing to the meaning when it added the words "the donor has so far parted with his dominion and control", etc. This same conception is implicit in the language of the earlier regulations. Under the language of all the regulations, a gift tax attaches on the occurrence of a prescribed event, namely, on the termination of the donor's power to re-vest in himself any beneficial interest in the corpus, and, since the language describing the event is perfectly clear, at that point the gift in trust is complete for gift tax purposes, regardless of the retention or non-retention of any control over the use by others. Certainly from the standpoint of completeness, an irrevocable gift in trust subject only to a non-bene-

ficial power to modify in favor of others is as complete as an absolute transfer in trust with future contingencies set forth in the trust indenture. In such a case no one has ever suggested that the gift tax is postponed until the final contingencies are resolved and the beneficiaries ultimately fixed. Yet under the reasoning of the Court in its opinion, it is now extremely doubtful whether in such a case the gift is to be deemed complete on the creation of the trust, particularly in view of the secondary liability which, under the opinion, would fall on the named beneficiaries although their interests are still contingent.

#### IV.

On page 7 of its opinion, the Court, we respectfully suggest, misinterprets our argument. We do not maintain that the 1924 Regulation laid down any rule in cases where there was a reserved power different from or in addition to the power to revest the title in the donor. Our contention is that under the earlier regulations as under the 1936 Regulation the taxable transfer occurs on the relinquishment of the power to revest the beneficial title in the donor, and that the happening of such an event is the test of completeness of the gift for gift tax purposes, regardless of the retention of a power of control for others. If so, in the *Hesslein* case and the *Humphreys* case, the gift was complete for gift tax purposes on the creation of the trusts in 1934, and in the *Sanford* case it was complete in 1919. The absence of a gift tax in that year does not vary the rule or justify the later imposition of a tax upon Sanford in 1924 upon the surrender of the retained power of control. There is no possible ground to attribute to Sanford any intent to evade a gift tax, so no liability can arise on this score.

## V.

It is respectfully suggested that the controlling phrase in the Commissioner's regulations is not necessarily equivalent to the phrase "the relinquishment of the power of revocation".

As a word of art, the word "revoke" implies, we suggest, not a taking away from the beneficiaries, but a taking back by the grantor for his own use. As in the case of any word, it is possible, of course, to attribute to the word "revoke" as used in the phrase "a power of revocation" a different and broader meaning, encompassing the right to control for others as well as the right to retake for himself. When used in the latter sense, the *relinquishment* of such a power would require the termination of all power to control, whether for the grantor or others, as distinguished from the termination of the right to retake or recall for himself. It is not entirely clear from the opinion in which sense the Court used the phrase. But, in view of the last paragraph of the footnote on page 4, the Court apparently considers that the language of the earlier regulations and of Section 501 (c) of the 1932 Act, namely, "the relinquishment" of "the power to revest in himself title to the corpus of the trust", conveys the same meaning as "the relinquishment of the power of revocation". If the phrase "the relinquishment of the power of revocation" is used in its broader meaning, we respectfully suggest that this is not the case.

The word "revoke" or "the relinquishment of the power of revocation" does not appear in either Section 219 (g), or in any of the Commissioner's gift tax regulations, or in Section 501 (c) of the 1932 Act. The word was ready at hand, for it appears in Sec-

tion 302 (d) coupled with the words "alter" and "amend". Since ready at hand and appearing in Section 302 (d), it is significant that it was not used either in the income tax provisions or the gift tax provisions. The phrase employed in both places is "the relinquishment of the power to revest in himself title to the corpus".

The conception implicit in this phrase is, we respectfully suggest, fundamentally different from the broader meaning of the phrase "the relinquishment of the power of revocation", and for evident reasons. The test for income and gift tax purposes is and was intended to be the power or lack of power in the grantor to control *for himself* the *beneficial* enjoyment of the corpus. This, we submit, is the meaning implicit in the phrase used in the gift tax regulations and in Section 501 (c) of the 1932 Act. It connotes the legal ability of the grantor to retake the corpus so that he may enjoy for himself the beneficial interest, such as the right freely to sell for a consideration and to use for himself the income free from let or hindrance. On the occurrence of the surrender of such a power the gift in trust is complete and the gift tax attaches. To ascribe to the phrase any other or broader meaning would render it meaningless, in the light of its setting and purpose in the regulations and the statute. Indeed it is somewhat startling to find this Court giving to the Commissioner's own regulations a meaning which neither the Commissioner nor his chief law officer ascribed to them, or even considering such regulations ambiguous when both the Commissioner and his chief law officer had no doubt of the meaning, as evidenced by the uniform and consistent practice in adjusting some 300 cases "of the character of that here involved".



The Circuit Court of Appeals for the Second Circuit in the *Knapp* case gave to the same phrase the very meaning which we ascribe to it, and categorically held that the event which shifted the income tax from the grantor to the trust estate was the relinquishment by the grantor of the right to retake the income for himself, even though the grantor retained the right of control over the enjoyment by others.

We appreciate that the concept of a taxable transfer for estate and gift tax purposes contemplates the shifting of the economic benefits rather than any "technical changes in title", and we would apply such a test in the case of gifts in trust subject to reserved powers. The distinction we would make is the distinction between the irrevocable transfer of those primary economic benefits in property, such as the right of use, enjoyment and disposition for the grantor's own benefit, as distinguished from the relatively less important power of control over the use by others, less important because by its nature such a power excludes any pecuniary benefits to the grantor. There is nothing incongruous in such a distinction. For some thirteen years the Commissioner uniformly applied it in administering his own gift tax regulations. Congress adopted it in drafting Section 501 (c) of the 1932 Act. It is implicit in Section 219 (g) of the income tax provisions, which still represents the declared policy of Congress. The rule for which we contend is not in any sense predicated upon "technical changes in title".

## VI.

We respectfully suggest that the Court has misconceived the stipulation of record covering the uniform practice in adjusting cases of the character of

those here involved. In executing the stipulation, the purpose of the parties was to lay before the Court the consistent and uniform practice on the part of the Commissioner in adjusting all cases, some 300 in number, which involve the precise issue presented in the *Sanford* case, namely, whether in the case of a transfer in trust subject to reserved powers the Commissioner, as a matter of practice, has collected the gift tax at the point when the grantor relinquishes the right to retake for himself the beneficial interest in the corpus, or upon the termination of the retained power to modify in favor of others. Regardless of any variance in detail among such 300 cases, there can be no doubt what *in fact* were the legal issues involved. The materiality of the practice rests on consistency and uniformity in applying one test or the other. The parties did not agree or undertake to agree that thus and so was the correct interpretation of the statute. The stipulation discloses the administrative action taken in all such cases, and as such it is a stipulation of fact.

The uniformity in the administrative practice as disclosed by the stipulation is not undermined by any change of ruling in the *Sanford* case. The established practice, *vel non*, is not dependent on action in the particular case under contest. It is the variance from the practice in the case under contest which brings forward the appeal to *prior* continuity of practice.

## VII.

The Court at the top of page 5 of its opinion says that our contention that the gift becomes complete and taxable upon the relinquishment of the power to retake cannot be sustained, unless the Court is to hold that a second tax will be incurred upon the relinquish-

ment at death of the power to select new beneficiaries, or unless as an alternative the rule in the *Porter* case is to be abandoned. This, we respectfully suggest, is not the case. Under our contention, the credits allowed by the estate tax sections on account of gift taxes paid on *inter vivos* transfers will largely eliminate any estate tax, although some balance will be due on account of the difference in rates. When this Court said in the *Guggenheim* case that "Congress did not mean that the tax should be paid twice", it is evident from the context that the remark had reference to a second *inter vivos* tax under the gift tax provisions and not to an estate tax following a gift tax. In the case of a gift in contemplation of death, the gift *inter vivos* when made is unquestionably subject to the gift tax, and it is also on death part of the gross estate and again taxable, subject to the gift tax credits. The reasoning of Mr. Justice Cardozo predicated on one gift tax necessarily was limited to the tax collected under the gift tax provisions.

There is nothing in our contention which casts any doubt upon the soundness of the decision in the *Porter* case, even though the decision goes to the extent of holding that the existence on death of a power of control for the use by others constitutes a transfer of property on death. All the parties to these cases agree that under the gift tax provisions Congress has the power to impose the gift tax either at the earlier or the later point, and it is a question only of which point Congress intended to select. Under our contention it would simply mean that for gift tax purposes a gift tax would be collected at the earlier point, and that, if the powers thereafter retained were still in existence on death, the property would constitute part of the gross estate, subject to the statutory credits, as in the case of a gift in contemplation of death.

## VIII.

The Court evidently gave weight to the statement of the Solicitor General that he is "unable to determine which construction of the statute will be most advantageous to the Government in point of revenue." We have marshalled the evidence to the contrary based on the facts of record in this case on pages 12-14 of our reply brief. But aside from such evidence and as a matter of reasoning and sound judgment, it is implicit in the rule contended for by the taxpayer in the *Hesslein* case and in the *Humphreys* case that inevitably a substantial loss of revenue will occur, certainly so long as the income tax provisions remain as they are now drawn. We do not need to tell this Court that the taxpayers of the country have in the past and will continue in the future to seize upon any legitimate means of reducing taxes. Under the decision of this Court as it now stands, there necessarily must exist a loophole in our revenue statutes through which an incalculably large amount of income taxes will be lost. Those who were charged in the Treasury with deciding the *Sanford* case when it was before the Bureau fully recognized the dangers of the situation. Surely the responsible officials now in the Department of Justice and in the Treasury are acting under a misapprehension of fact when they say that they do not know which rule will be more advantageous to the Government.

For the future, such a result might possibly be avoided through some amendment to Section 219 (g) [now Section 166] of the income tax Title. But to accomplish the needed change, it would be necessary to impose the income tax upon the grantor even after

he had lost any right to receive or enjoy the income or principal for himself. Congress might well hesitate to impose such an onerous burden upon the taxpayers of the country, even aside from the grave constitutional question which such an amendment would present. Through the experience of years, it has proven sound in principle and sound in practice to shift the burden of the income tax from the grantor to the trust estate at the point where the grantor can no longer enjoy for himself the income. Yet under the present decision of this Court, such a rule must go by the board and a new and untried income tax rule replace it, if the Government revenues are to be preserved.

Conceivably Congress might amend the gift tax provisions and prescribe for the future the rule for which we now contend. Such a change could not be made retroactively, as we point out in the footnote of our main brief on page 32, and such action would indeed be highly inequitable, to the Government in such cases as the *Hesslein* case and the *Humphreys* case, and to the taxpayer in such cases as the *Sanford* case.

Today the assets of the Sanford estate do not exceed \$20,000, in all, and are subject to a charge for administration expenses. Transferee proceedings are pending against the trustee of the trust, but the 10-year statutory lien on the property has long since expired. There are over 40 beneficiaries, many with minor life annuities. A substantial amount of the trust income is payable to non-resident aliens and the enjoyment of the remainders is still contingent and uncertain.



It is respectfully submitted that this application for a rehearing should be granted and that this case should be set down for reargument.

Respectfully submitted,

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Attorneys for the Petitioner.

Dated: November 24, 1939.

We, the attorneys of record for the petitioner herein, certify that this petition for rehearing is presented in good faith and not for delay.

JOHN W. DAVIS,  
MONTGOMERY B. ANGELL,  
Attorneys for the Petitioner.

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# SUPREME COURT OF THE UNITED STATES.

No. 34.—OCTOBER TERM, 1939.

Estate of Charles Henry Sanford, De-  
ceased, Jennie R. Baird, Substitu-  
tionary Administratrix, C.T.A., Pe-  
titioner,

vs.

Commissioner of Internal Revenue.

On Writ of Certiorari to  
the United States Cir-  
cuit Court of Appeals for  
the Third Circuit.

[November 6, 1939.]

Mr. Justice STONE delivered the opinion of the Court.

This and its companion case, No. 37, *Rasquin v. Humphreys*, pre-  
sent the single question of statutory construction whether in the  
case of an *inter vivos* transfer of property in trust, by a donor re-  
serving to himself the power to designate new beneficiaries other  
than himself, the gift becomes complete and subject to the gift tax  
imposed by the federal revenue laws at the time of the relinquish-  
ment of the power. Co-relative questions, important only if a neg-  
ative answer is given to the first one, are whether the gift becomes  
complete and taxable when the trust is created or, in the case where  
the donor has reserved a power of revocation for his own benefit  
and has relinquished it before relinquishing the power to change  
beneficiaries, whether the gift first becomes complete and taxable  
at the time of relinquishing the power of revocation.

In 1913, before the enactment of the first gift tax statute of 1924,  
decendent created a trust of personal property for the benefit of  
named beneficiaries, reserving to himself the power to terminate  
the trust in whole or in part, or to modify it. In 1919 he sur-  
rendered the power to revoke the trust by an appropriate writing  
in which he reserved "the right to modify any or all of the trusts"  
but provided that this right "shall in no way be deemed or con-  
strued to include any right or privilege" in the donor "to withdraw  
principal or income from any trust." In August, 1924, after the  
effective date of the gift tax statute, decendent renounced his remain-  
ing power to modify the trust. After his death in 1928, the Com-  
missioner following the decision in *Hesslein v. Hoey*, 91 F. (2d)

954, in 1937, ruled that the gift became complete and taxable only upon decedent's final renunciation of his power to modify the trusts and gave notice of a tax deficiency accordingly.

The order of the Board of Tax Appeals sustaining the tax was affirmed by the Court of Appeals for the Third Circuit, 103 F. (2d) 81, which followed the decision of the Court of Appeals for the second circuit in *Hesslein v. Hoey*, *supra*, in which we had denied certiorari, 302 U. S. 756. In the *Hesslein* case, as in the *Humphreys* case now before us, a gift in trust with the reservation of a power in the donor to alter the disposition of the property in any way not beneficial to himself, was held to be incomplete and not subject to the gift tax under the 1932 Act so long as the donor retained that power.

We granted certiorari in this case May 15, 1939, and in the *Humphreys* case May 22, 1939, upon the representation of the Government that it has taken inconsistent positions with respect to the question involved in the two cases and that because of this fact and of the doubt of the correctness of the decision in the *Hesslein* case decision of the question by this Court is desirable in order to remove the resultant confusion in the administration of the revenue laws.

It has continued to take these inconsistent positions here, stating that it is unable to determine which construction of the statute will be most advantageous to the Government in point of revenue collected. It argues in this case that the gift did not become complete and taxable until surrender by the donor of his reserved power to designate new beneficiaries of the trusts. In the *Humphreys* case it argues that the gift upon trust with power reserved to the donor, not afterward relinquished, to change the beneficiaries was complete and taxable when the trust was created. It concedes by its brief that "a decision favorable to the government in either case will necessarily preclude a favorable decision in the other."

In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 of the Revenue Act of 1924, 43 Stat. 253, reenacted as Sec. 501 of the 1932 Act, 47 Stat. 169, imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws. When the gift tax was enacted Congress was aware that the essence of a transfer is



the passage of control over the economic benefits of property rather than any technical changes in its title. See *Burnett v. Guggenheim*, 288 U. S. 280, 287. Following the enactment of the gift tax statute this Court in *Reinecke v. Northern Trust Company*, 278 U. S. 339 (1929) held that the relinquishment at death of a power of revocation of a trust for the benefit of its donor was a taxable transfer. Cf. *Saltonstall v. Saltonstall*, 276 U. S. 260; *Chase National Bank v. United States*, 278 U. S. 327, and similarly in *Porter v. Commissioner*, 288 U. S. 436 (1933); that the relinquishment by a donor at death of a reserved power to modify the trust except in his own favor is likewise a transfer of the property which could constitutionally be taxed under the provisions of § 302(d) of the 1926 Revenue Act (reenacting in substance 302(d) of the 1924 Act) although enacted after the creation of the trust. Cf. *Bullen v. Wisconsin*, 240 U. S. 625; *Curry v. McCannless*, 307 U. S. 357; *Graves v. Elliott*, 307 U. S. 383. Since it was the relinquishment of the power which was taxed as a transfer and not the transfer in trust, the statute was not retroactively applied. Cf. *Nichols v. Coolidge*, 274 U. S. 531; *Helvering v. Hamblin*, 296 U. S. 93, 98. Helms 402

The rationale of decision in both cases is that "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed." See *Corliss v. Bowers*, 281 U. S. 376, 378; *Saltonstall v. Saltonstall*, *supra*, 261; *Burnett v. Guggenheim*, *supra*, 287, and that a retention of control over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the power is relinquished whether in life or at death. The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with power reserved to the donor either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than himself is incomplete, and becomes complete so as to subject the transfer to death taxes only on relinquishment of the power at death.

There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supple-

mentary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet v. Guggenheim*, *supra*, 286. An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.<sup>1</sup>

Section 322 of the 1924 Act provides that when a tax has been imposed by § 319 upon a gift, the value of which is required by any provision of the statute taxing the estate to be included in the gross estate, the gift tax is to be credited on the estate tax. The two taxes are thus not always mutually exclusive as in the case of gifts made in contemplation of death which are complete and taxable when made, and are also required to be included in the gross estate for purposes of the death tax. But § 322 is without application unless there is a gift *inter vivos* which is taxable independently of any requirement that it shall be included in the gross estate. Property transferred in trust subject to a power of control over its disposition reserved to the donor is likewise required by § 302(d) to be included in the gross estate. But it does not follow that the transfer in trust is also taxable as a gift. The point was decided in the *Guggenheim* case where it was held that a gift upon trust, with power in the donor to revoke it is not taxable as a gift because the transfer is incomplete, and that the transfer whether *inter vivos* or at death becomes complete and taxable only when the power of control is relinquished. We think, as was pointed out in the *Guggenheim* case, *supra*, 285, that the gift tax statute does not contemplate two

<sup>1</sup> The gift tax provisions of the Revenue Act of 1924 were added by amendments to the revenue bill introduced on the floor of the House and the Senate. Cong. Rec., Vol. 65, Part 3, pp. 3118-3119; Part 4, pp. 3170, 3171; Part 5, p. 8094. The sponsor of the amendment in both houses urged the adoption of the bill as a "corollary" or as "supplemental" to the estate tax. Cong. Rec., Vol. 65, Part 3, pp. 3119-3120, 3122; Part 4, p. 3172; Cong. Rec., Vol. 65, Part 5, pp. 8095, 8096.

The gift tax of 1924 was repealed when Congress, concurrently with the enactment of § 302(f) of the Revenue Act of 1926, 44 Stat. 70, 125, 126, establishing a conclusive presumption that gifts within two years of death were made in contemplation of death and therefore subject to the estate tax. A gift tax was reenacted by § 501 of the Revenue Act of 1932, 47 Stat. 169, shortly after it was decided in *Heiner v. Donnan*, 285 U. S. 312, that the legislative enactment of such a presumption violated the Fifth Amendment.

Section 501(c) of the 1932 Act added a new provision that transfers in trust, with power of revocation in the donor, should be taxed on relinquishment of the power. This was repealed by § 511 of the Act of 1934, 48 Stat. 680, because *Burnet v. Guggenheim*, 285 U. S. 280, had declared that such was the law without specific legislation. H. R. No. 704, 73rd Cong., 2d Sess., p. 40; Sen. Rep. No. 556, 73rd Cong., 2d Sess., p. 50.

taxes upon gifts not made in contemplation of death, one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete.

It is plain that the contention of the taxpayer in this case that the gift becomes complete and taxable upon the relinquishment of the donor's power to revoke the trust cannot be sustained unless we are to hold, contrary to the policy of the statute and the reasoning in the *Guggenheim* case, that a second tax will be incurred upon the donor's relinquishment at death of his power to select new beneficiaries, or unless as an alternative we are to abandon our ruling in the *Porter* case. The Government does not suggest, even in its argument in the *Humphreys* case, that we should depart from our earlier rulings, and we think it clear that we should not do so both because we are satisfied with the reasoning upon which they rest and because departure from either would produce inconsistencies in the law as serious and confusing as the inconsistencies in administrative practice from which the Government now seeks relief.

There are other persuasive reasons why the taxpayer's contention cannot be sustained. By §§ 315(b), 324, and more specifically by § 510 of the 1932 Act, the donee of any gift is made personally liable for the tax to the extent of the value of the gift if the tax is not paid by the donor. It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property, so incomplete that he might be deprived of it by the donor the day after he had paid the tax. Further, § 321(b)(1) exempts from the tax, gifts to religious, charitable, and educational corporations and the like. A gift would seem not to be complete; for purposes of the tax, where the donor has reserved the power to determine whether the donees ultimately entitled to receive and enjoy the property are of such a class as to exempt the gift from taxation. Apart from other considerations we should hesitate to accept as correct a construction under which it could plausibly be maintained that a gift in trust for the benefit of charitable corporations is then complete so that the taxing statute becomes operative and the gift escapes the tax even though the donor should later change the beneficiaries to the non-exempt class through exercise of a power to modify the trust in any way not beneficial to himself.

The argument of petitioner that the construction which the Government supports here, but assails in the *Humphreys* case, affords a ready means of evasion of the gift tax is not impressive. It is true, of course, that under it gift taxes will not be imposed on transactions which fall short of being completed gifts. But if for that reason they are not taxed as gifts they remain subject to death taxes assessed at higher rates, and the Government gets its due, which was precisely the end sought by the enactment of the gift tax.

Nor do we think that the provisions of § 219(g) of the 1924 Act have any persuasive influence on the construction of the gift tax provisions with which we are now concerned. One purpose of the gift tax was to prevent or compensate for the loss of surtax upon income where large estates are split up by gifts to numerous donees.<sup>2</sup> Congress was aware that donors in trust might distribute income among several beneficiaries, although the gift remains so incomplete as not to be subject to the tax. It dealt with that contingency in § 219(g) which taxes to the settlor the income of a trust paid to beneficiaries where he reserved to himself an unexercised power to "re-vest in himself title" to the trust property producing the income. Whether this section is to be read as relieving the donor of the income tax where the power reserved is to modify the trust, except for his own benefit, we do not now decide. If Congress, in enacting it, undertook to define the extent to which a reserved power of control over the disposition of the income is equivalent to ownership of it so as to mark the line between those cases on the one hand where the income is to be taxed to the donor and those on the other where, by related sections, the income is to be taxed to the trust or its beneficiaries, we do not perceive that the section presents any question so comparable to that now before us as to affect our decision. We are concerned here with a question to which Congress has given no answer in the words of the statute, and it must be decided in conformity to the course of judicial decision applicable to a unified scheme of taxation of gifts whether made *inter vivos* or at death. If Congress, for the purpose of taxing income, has defined precisely the amount of control over the income which it deems equivalent to ownership of it, that definition is controlling on the courts even though without it they might reach a different conclusion, and even though retention of a lesser degree of control be deemed to

<sup>2</sup> See references to Congressional Record, Footnote 1.

render a transfer incomplete for the purpose of laying gift and death taxes.

The question remains whether the construction of the statute which we conclude is to be derived from its language and history, should be modified because of the force of treasury regulations or administrative practice. Article I of Regulations 67, under the 1924 Act (adopted without any change of present significance in Article III, Regulations 79, under the 1932 Act) provides that the creation of a trust where the grantor retains the power to revest in himself title to the corpus of the trust does not constitute a gift subject to the tax and declares that "where the power retained by the grantor to revest in himself title to the corpus is not exercised, a taxable transfer will be treated as taking place in the year in which such power is terminated". Petitioner urges that the regulation is in terms applicable to the trust presently involved because it was subject to a power of revocation in favor of the donor before the enactment of the gift tax which was later relinquished. But we think, as the court below thought, that the regulation was not directed to the case of the relinquishment of a reserved power to select new beneficiaries other than the donor and did not purport to lay down any rule for cases where there was a reserved power different from or in addition to the power to revest the title in the donor. At most the regulation is ambiguous and without persuasive force in determining the true construction of the statute. *Burnett v. Chicago Portrait Co.*, 285 U. S. 1, 16, 20. The amended regulation of 1936 under the 1932 Act, Art. III, Reg. 79, removed the ambiguity by declaring that the gift is complete and subject to the tax when "the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself". But this regulation is by its terms applicable only to gifts made after June 6, 1932 and is of significance here only so far as it is declaratory of the correct construction of the 1924 Act.

Petitioner also insists that the construction of the statute for which he contends is sustained by the administrative practice. That practice is not disclosed by any published Treasury rulings or decisions and our only source of information on the subject is a stipulation appearing in the record. It states that in the administration of the gift tax under the 1924 and 1932 Acts and until the



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decision in the *Hesslein* case it was "the uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved to treat the taxable transfer subject to gift tax as occurring when the transferor relinquished all power to revest in himself title to the property constituting the subject of the transfer"; and that three hundred cases "of such character" have been closed or adjusted in conformity to this practice.

This definition of the practice appears as a part of a stipulation of facts setting forth in some 126 printed pages the original trust deed of December 24, 1913, and thirteen modifications of it between that date and the final relinquishment of the power of modification on August 20, 1924. They reveal a varied and extensive power of control by the donor over the disposition of the trust property which survived the relinquishment, in 1919, of the power of revocation for his own benefit, and with which he finally parted after enactment of the gift tax. The description of the practice as that resorted to in adjusting "cases of the character of that here involved", presupposes some knowledge on our part of what the signers of the stipulation regarded as the salient features of the present case which, although not specified by the stipulation, were necessarily embraced in the practice. Administrative practice, to be accepted as guiding or controlling judicial decision, must at least be defined with sufficient certainty to define the scope of the decision. If relinquishment of the power of revocation mentioned by the stipulation was of controlling significance in defining the practice, that circumstance was not present in the *Hesslein* case or in the *Humphreys* case. Whether in any of the three hundred cases mentioned in the stipulation the relinquishment of the power of revocation was followed by the relinquishment *inter vivos* of a power of changing the beneficiaries like that in this case, does not appear.

Such a stipulated definition of the practice is too vague and indefinite to afford a proper basis for a judicial decision which undertakes to state the construction of the statute in terms of the practice. Moreover, if we regard the stipulation as agreeing merely that the legal questions involved in the present case have uniformly been settled administratively in favor of the contention now made by the petitioner, it involves conclusions of law of the stipulators, both

with respect to the legal issues in the present case and those resolved by the practice. We are not bound to accept, as controlling, stipulations as to questions of law. *Swift & Co. v. Hocking Valley Railway Co.*, 243 U. S. 281, 289.

Without attempting to say what the administrative practice has actually been we may, for present purposes, make the assumption most favorable to the taxpayer in this case that the practice was as stated by the Government in its brief in the *Humphreys* case, viz., that until the decision in the *Hesslein* case "the Bureau consistently took the position that the gift tax applied to a transfer in trust where the grantor reserved the right to modify the trust but no right to vest title in himself."

But the record here shows that no such practice was recognized as controlling in 1935 when the present case first received the attention of the Bureau. On February 21, 1935, the Assistant General Counsel gave an opinion reviewing at length the facts of the present case and the applicable principles of law, and concluded on the reasoning and authority of the *Guggenheim* and *Porter* cases that the gift was not complete and taxable until the relinquishment in August, 1924 of the power to modify the trust by the selection of new beneficiaries. In April, 1935, the matter was reconsidered and a new opinion was given which was finally adopted by the assistant secretary who had intervened in the case. This opinion reversed the earlier one on the authority of the *Guggenheim* case. It was at pains to point out that in that case the Court had held that the relinquishment of the power of revocation was a taxable gift but it made no mention of the fact that there, unlike the present case, there was no power of modification which survived the relinquishment of the power of revocation, which was crucial in the *Porter* case. Neither opinion rested upon or made any mention of any practice affecting cases where such a power of modification is reserved. After the decision in the *Hesslein* case the ruling of the Bureau in this case was again reversed and notice of deficiency sent to the taxpayer.

From this record it is apparent that there was no established administrative practice before the opinion of April, 1935,<sup>3</sup> and

<sup>3</sup> In the petition for certiorari filed in November, 1937, in *Hesslein v. Hogg* (No. 556); the government asserted that the 300 cases referred to in the stipulation in this case had been decided so recently that the time for filing claims for refunds had not expired.

if the practice was adopted then it was because of a mistaken departmental ruling of law based on an obvious misinterpretation of the decisions in the *Porter* and *Guggenheim* cases.

Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law. Such a choice, in practice, of one of two possible constructions of a statute by those who are expert in the field and specially informed as to administrative needs and convenience, tends to the wise interpretation and just administration of the laws. This is the more so when reliance has been placed on the practice by those affected by it.

But courts are not bound to accept the administrative construction of a statute regardless of consequences, even when disclosed in the form of rulings. See *Helvering v. New York Trust Co.*, 292 U. S. 455, 468. Here the practice has not been revealed by any published rulings or action of the Department on which taxpayers could have relied. The taxpayers in the present cases are contending for different rulings. In *Harriet Rosenau*, 37 B. T. A. (1938),<sup>468</sup> as in the *Humphreys* case, the taxpayer contended that the date when the power to change the beneficiary is renounced is controlling. The petitioner here, who contends that the date of relinquishment of the power of revocation is controlling, rather than the date of surrender of power of modification, set up his trust and relinquished the power of revocation before the gift tax was enacted. The reenactment of the gift tax statute by the 1932 Act can not be said to be a legislative approval of the practice which had not been disclosed by Treasury regulation, ruling or decision, and which does not appear to have been established before the adoption of the 1932 Act. Cf. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492; *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U. S. 269, 273; *Helvering v. New York Trust Co.*, 292 U. S. 455, 468.

The very purpose sought to be accomplished by judicial acceptance of an administrative practice would be defeated if we were to regard the present practice as controlling. If a practice is to be accepted because of the superior knowledge of administrative officers of the administrative needs and convenience, see *Brewster v. Gage*,



280 U. S. 327, 336, there is no such reason for its acceptance here. The Government by taking no position confesses that it is unable to say how administrative need and convenience will best be served. If, as we have held, we may reject an established administrative practice when it conflicts with an earlier one and is not supported by valid reasons, see *Burnett v. Chicago Portrait Co.*, 258 U. S. 1, 16, we should be equally free to reject the practice when it conflicts with our own decisions. A change of practice to conform to judicial decision, such as has occurred since the decision in the *Hesslein case*, or to meet administrative exigencies, will be accepted as controlling when consistent with our decisions. *Morrissey v. Commissioner*, 296 U. S. 344, 354. Here we have an added, and we think conclusive reason for rejecting the earlier practice and accepting the later. The earlier, because in sharp conflict with our own decisions, as we have already indicated, cannot be continued without the perpetuation of inconsistency and confusion comparable to that of which the Government asks to be relieved by our decision.

*Affirmed.*

Mr. Justice BUTLER took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*





